Supreme Court, U.S.
FILED

01 971 OCT 29 2001

OFFICE OF THE CLERK

No.

In the

Supreme Court of the United States

VIVIAN PIPER,

Petitioner,

versus

ANN VENEMAN, SECRETARY, DEPARTMENT OF AGRICULTURE, NATIONAL FINANCE CENTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES C. FERGUSON
Counsel of Record
343 Third Street, Suite 410
Baton Rouge, LA 70801
(225) 346-8608
Attorney for Petitioner

84pp

QUESTIONS PRESENTED

I. Whether the Court of Appeals and the District Court denied Petitioner equal protection under the law in violation of the 14th Amendment to the United States Constitution by not applying the proper legal standard of the clear and convincing evidence rule against the respondent who has maintained the same pattern and practice of discrimination and retaliation for over 20 years, a proven discriminator in the allocation of the burden of proof is in direct conflict with the Fifth Circuit decision of Cooper V. Allen, Keyes V. School District No. 1, Denver, Colorado; and Bundy V. Jackson, by applying the burden of persuasion for respondent's proof of its legitimate Non-discriminatory reasons, misinterpretation, and misapplication of the law for their convenience against prevailing jurisprudence in an individual discrimination case?

II. Did the District Court and the Fifth Circuit Court of Appeals exceed their authority under Federal Rules of Civil Procedure Rule 56 by dismissing all 16 of Petitioner's Promotional Claims and all of Petitioner's disparate treatment claims when Respondent only raised four promotion claims and not any disparate treatment claims in violation of the 14th Amendment to the United States Constitution wherein the Court did not give Petitioner notice and an opportunity to be heard; there was no request from either parties for a dismissal of these claims, no evidence was produced by any party as to the absence or presence of any genuine issues of material facts, especially under the circumstances where the facts surrounding each claim are different and said actions of the courts are in direct conflict with the prevailing jurisprudence and Celotex Corp. V. Catrett, in this partial motion for summary judgment?

III. Whether the Court of Appeals and the District Court committed patent error by dismissing petitioner's disparate treatment claims which was never raised in respondent's motion and all retaliation claims by confusing disparate treatment with retaliation creating a conflict in the Fifth Circuit decisions of Rutherford V. Harris County Tex., and Shackleford V. Deloitte & Touche ?

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities v

Opinion Below 1

Jurisdiction 1

Statutory Provisions Involved 1

Statement of the Case 2

Reasons for Granting the Writ 6

I. THE DECISIONS FOR THE COURT OF APPEALS AND TRIAL COURT IN THIS CASE IS OF EXCEPTIONAL PUBLIC IMPORTANCE BECAUSE THE COURT HERE HAS TRIED TO REDUCE THE BURDEN OF PROOF FOR AN EMPLOYER WHO HAS A PAST PROVEN HISTORY OF DISCRIMINATION BY REFUSING TO APPLY THE CLEAR AND CONVINCING EVIDENCE RULE. THIS TYPE OF DECISION IS HARSH AND UNJUST TO VICTIMS OF PAST DISCRIMINATION BY THE FIFTH CIRCUIT BIZARRE ATTEMPT TO RESTRICT THE CLEAR AND CONVINCING EVIDENCE RULE TO CLASS ACTIONS CASES AND EXCLUDING PAST VICTIMS IN INDIVIDUAL CASES. THE FIFTH CIRCUIT AND THE DISTRICT COURT DECISIONS ARE IN CONFLICT WITH THE FIFTH CIRCUIT COURT CASE OF COOPER V. ALLEN, 467 F. 2D 836, 840 (5TH CIR. 1972), A CASE OF INDIVIDUAL DISCRIMINATION IN WHICH THE FIFTH CIRCUIT APPLIED THE CLEAR AND CONVINCING EVIDENCE RULE TO AN INDIVIDUAL CASE AFTER DENYING A CLASS ACTION 6

II. THE DISTRICT COURT AND THE FIFTH CIRCUIT COURT OF APPEALS EXCEEDED THEIR AUTHORITY UNDER FEDERAL RULES OF CIVIL PROCEDURE RULE 56 BY DISMISSING ALL 16 OF PETITIONER'S PROMOTIONAL AND DISPARATE TREATMENT CLAIMS WHEN RESPONDENT ONLY RAISED FOUR PROMOTIONAL CLAIMS IN ITS PARTIAL MOTION FOR SUMMARY JUDGMENT AND NO DISPARATE TREATMENT CLAIMS IN VIOLATION OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT THE COURT DID NOT GIVE PETITIONER NOTICE AND AN OPPORTUNITY TO BE HEARD; NEITHER PARTY REQUESTED FOR A DISMISSAL OF THESE CLAIMS; THE PARTIES WERE NOT ALLOWED TO SUBMIT EVIDENCE AS TO THE ABSENCE OR PRESENCE OF ANY GENUINE ISSUES OF MATERIAL FACTS AND THE FACTS AND CIRCUMSTANCE OF EACH OF THE 12 PROMOTIONAL CLAIMS AND ALL OF THE DISPARATE TREATMENT CLAIMS ARE SUBSTANTIALLY DIFFERENT. 7

III. THE COURT OF APPEALS AND THE DISTRICT COURT COMMITTED PATENT ERROR BY DISMISSING PETITIONER'S DISPARATE E TREATMENT CLAIMS WHICH WAS NEVER RAISED IN RESPONDENT'S MOTION AND PETITIONER'S RETALIATION CLAIMS BY CONFUSING DISPARATE TREATMENT WITH RETALIATION CREATING A CONFLICT AND CONFUSION IN THE FIFTH CIRCUIT DECISIONS OF RUTHERFORD V. HARRIS COUNTY TEX., 197 F. 3D 173, 184 5TH CIR. 1999) AND SHACKLEFORD V. DELOITTE & TOUCHE, 194 F. 3D 398, 406-407 (5TH CIR, 1999) 8

Conclusion 10

Appendix

Circuit Court Opinion 1a

District Court Orders and Reasons..... 9a

Complaint..... 16a

Department of Agriculture EEO Complaint Final Decision. 23a

Memorandum in Opposition to Defendant's Motion for Summary Judgment..... 33a

U.S. Equal Employment Opportunity Commission Decision44a

Circuit Court Order 67a

TABLE OF AUTHORITIES

CASES

BAXTER V. SAVANNAH SUGAR REFINING CORP., 495 F. 2D 437 (5TH CIR. 1974) 6
BETTY V. WILLIAMETTE INDUSTRIES, INC., 172 F. 3D 123 (11TH CIR. 1999) 8
BUNDY V. JACKSON, 641 F. 2D 934 (D.C. CIR. 1987) 6
CIR. 1999) AND SHACKLEFORD V. DELOITTE & TOUCHE, 194 F. 3D 398, 406-407 (5TH CIR, 1999) 8
CIR., CERT. DENIED 119 S. CT. 2411 (1998) 8
CIR., CERT. DENIED 119 SUP. CT. 188 (1998) 8
DAS V. RIVERWEST, 152 F. 3D 471 8
DAY V. MATTHEWS, 530 F. 2D 1083 (D.C. 1976) 6, 7
FIFTH CIRCUIT AND THE DISTRICT COURT DECISIONS ARE IN CONFLICT WITH THE FIFTH CIRCUIT COURT CASE OF COOPER V. ALLEN, 467 F. 2D 836, 840 (5TH CIR. 1972) 6
FORSYTH V. CITY OF DALLAS, 91 F. 3D 169 (5TH CIR. 1996) 9
HUGULEY V. GENERAL MOTORS CORP., 52 F. 3D 1264 (1995) .. 9
INTERNATIONAL BOARD OF TEAMSTERS V. UNITED STATES, 421 U.S. 324 (1977) 8
KEYES V. SCHOOL DISTRICT NO. 1. DENVER, COLORADO, 93 S. CT. 2698 (1973) 6
KIM V. NASH FINCH CO., 123 F. 3D 1046 (8TH CIR. 1997) 9
LEHMAN V. PRUDENTIAL INSURANCE CO., 74 F. 3D 323 (1996) 9
MORRIS V. COVEN WORLD WIDE MOVING, INC., 144 F. 3D 377 (5TH CIR. 1998) 8
RUTHERFORD V. HARRIS COUNTY, TEX., 197 F. 3D 17S, 184 (5TH CIR. 1999) 9
SHACKLEFORD V. DELOITTE & TOUCHE, 190 F. 3D 398, 406-407 (5TH CIT. 1999) 9
SMITH V. BRENOETTORY, 158 F. 3D 908 (5TH CIR. 1998) 8
WAGNER V. TAYLOR, 836 F. 2D 566 (D.C. CIR. 1977) 9
WITH CELOTEX CORP. V. CATRETT, 477 U.S. 317, 326 (1986) 8
WITT V. ROADWAY EXP., 136 F. 3D 1424 8

STATUTES

42 U.S.C. s2000 1
FRCP, RULE 56 2
GS-13 5
NON-PROMOTION TO SUPERVISORY OPERATING ACCOUNTANT GS-510-12 3
SYSTEM ACCOUNTANT GS-510-13 3
VAC.ANN. 97-405 GS-13 5
VAC.ANN.97061 *97-064 GS-14 5
VAC.ANN.99-014 GS-14 5
VAC.ANN.99-115 GS-14 5

OPINIONS BELOW

The Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit in Vivian Piper V. Ann Veneman, Secretary, Department of Agriculture, National Finance Center is unpublished and set forth in the Appendix hereto (App. 1A)

The opinion of the United States District Court For Eastern District of Louisiana in Vivian Piper V. Ann Veneman, Secretary, Department of Agriculture, National Finance Center is unreported and set forth in the Appendix hereto along with the District Court's Order and Final Judgment (App. 9A)

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Fifth Circuit, affirming the final judgment of the District for the Eastern District of Louisiana after denying Petitioner a Rehearing En Banc filed on June 27, 2001.

(App. 2A). This petition of Certiorari is filed within 90 days from that date., 28 U.S.C. Section 2101.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. s2000-e

Federal Rules of Civil Procedure Rule 56

Fourteenth Amendment TO The United States CONSTITUTION

STATEMENT OF THE CASE

I. INTRODUCTION

Petitioner on December 9, 1998 filed a complaint listing 16 separate claims alleging racial employment discrimination, employment retaliation, and disparate treatment. Respondent filed a motion for partial summary judgment pursuant FRCP, Rule 56 pertaining only to four of the 16 promotional claims. Petitioner responded in opposition to the 4 claims under attack by Respondent. Disparate treatment claims were not raised by Respondent and the retaliations claims were attacked. The Trial Court dismissed all 16 claims. Neither party requested dismissal of the other 12 claims and were not given notice of the Trial Court intended action, no opportunity to be heard or to submit evidence, and the Trial Court dismissed the other 12 claims without evidence of the presence or absence of genuine issues of material facts. The facts and circumstances surrounding each claim were substantially different.

II. Course Of Proceedings In The Court Below:

Petitioner has shown that respondent has a history of past discrimination on the basis of race, age, sex discrimination and retaliation. Respondent has maintained the same pattern and practice of discrimination for over 15 years. The District Court granted a summary judgment in Respondent's favor and the Fifth Circuit Appeals refused to apply the clear and convincing evidence rule against Respondent, a proven discriminator, omitted the stated issue of disparate treatment, used the wrong legal standards for a summary judgment by requiring Petitioner to prove her case instead of raising issues of genuine material facts. The trial court restricted and dismissed Petitioner retaliation claims erroneously, and dismissed all of Petitioner's Non-promotion claims and disparate treatment that

were not raised in Respondent's partial motion for summary judgment.

III. STATEMENT OF THE FACTS

Petitioner, black employee, commenced work with Respondent National Finance Center in June 1974. Respondent is currently employed as a System Accountant GS-510-13.

Petitioner filed her first complaint of discrimination covering the period June 30, 1974 to December 21, 1975 on the basis of promotion and harassment.

On August 27, 1980, Petitioner filed a formal complaint against Respondent alleging that she was discriminated against because of race, sex, and reprisal for her previous EEO activities when she was not selected for promotion; denied training; part of her duties were transferred to others; harassed by her supervisor; denied overtime assignments; receiving low performance ratings. Petitioner's complaint became known as Piper V. Department of Agriculture, Appeal No. 0183250. The U.S. Equal Employment Opportunity Commission rendered a final decision on September 25, 1985 entering a finding of discrimination with regard to performance evaluation or apprisal, Non-promotion to Supervisory Operating Accountant GS-510-12, and the denial of overtime (App. 43A).

Be that as it may, Respondent did not learn anything from this finding of discrimination. Respondent continued its campaign of reprisal and discrimination against Petitioner. Petitioner filed suit in the U.S. District Court, Eastern District of Louisiana entitled **Vivian Piper Vs. Michael Espy, Secretary of The Department of Agriculture;** Civil Action No. 91-1582, "E" (3) in which Respondent continued its same patterns and practices that were in the EEO decision. This matter was settled in the Spring of 1994 and a judgment of dismissal was entered on June 22, 1994.

After the judgment of dismissal, Respondent continued to commit acts of reprisal and discrimination against Petitioner.

Respondent on numerous occasions continued to commit disparate treatment against Petitioner by placing white employees in acting positions where the white employees could gain experience in jobs and be promoted in these jobs by the use of special criteria unknown to applicants applying for positions in order to disguise discrimination, an overt denial of equal employment opportunities. Respondent also used disparate treatment by engaging in the pattern and practices of placing lower grade employees over the Petitioner.

Respondent committed further acts of disparate treatment against Petitioner by using the pattern and practice of denying Petitioner promotions, giving her consistent low performance evaluations, improper evaluations, denying cash awards, promoting employees with less qualification than her, use of subjective criteria not set forth in the job announcements to deny her promotions and disguising discrimination, her job responsibilities being transferred or reassigned to other positions outside of her line of work, placing her in hazardous work environment and transferring her to a position and area of Non accountant. Respondent's actions caused Petitioner to file this action of race discrimination, sex, and age on the basis of disparate treatment and retaliation.

Petitioner filed more than 32 EEO cases. Petitioner's complaints set forth 16 instances of Non-promotions. (App. 23A and 30A).

Respondent's partial motion for summary judgment only raised 4 Non-promotional vacancies, (App. 38A).

Petitioner set forth the following instances of Non-promotion that were not set forth in Respondent's partial motion for summary judgment.

Case No.	Position/Information	Selectee/Race/Sex
(1) 951370	GS-13	
(2) 952870		
(3) 960222		
(4) 960771		
(5) 970983	Vac.Ann. 97-405 GS-13	S.Morlier/White(M)
(6) 970442	Vac.Ann. 97-004 GM-14	
(7) 950509		
(8) 980179		
(9) 980260		
(10) 980313	Vac.Ann.97061 *97-064 GS-14	Loffenholtz/White(M) C.Harris/Black(F)
(11) 990272	Vac.Ann.99-115 GS-14	G.Millet/White(M)
(12) 990714	Vac.Ann.99-014 GS-14	R.Parent/Black(M)

Respondent only set forth 4 vacant positions; namely, NFC 97-004, NFC 95-087, NFC 94-017 and NFC 93-044 in its partial motion for summary judgment. The court rewrote Rule 56 by dismissing all the aforementioned Non-promotions that were not raised in Respondent's partial motion for summary judgment and the Court, without evidence never gave notice that it was going to decide these twelve promotional issues which had different facts.

REASONS FOR GRANTING THE WRIT

I. THE DECISIONS FOR THE COURT OF APPEALS AND TRIAL COURT IN THIS CASE IS OF EXCEPTIONAL PUBLIC IMPORTANCE BECAUSE THE COURT HERE HAS TRIED TO REDUCE THE BURDEN OF PROOF FOR AN EMPLOYER WHO HAS A PAST PROVEN HISTORY OF DISCRIMINATION BY REFUSING TO APPLY THE CLEAR AND CONVINCING EVIDENCE RULE. THIS TYPE OF DECISION IS HARSH AND UNJUST TO VICTIMS OF PAST DISCRIMINATION BY THE FIFTH CIRCUIT BIZARRE ATTEMPT TO RESTRICT THE CLEAR AND CONVINCING EVIDENCE RULE TO CLASS ACTIONS CASES AND EXCLUDING PAST VICTIMS IN INDIVIDUAL CASES. THE FIFTH CIRCUIT AND THE DISTRICT COURT DECISIONS ARE IN CONFLICT WITH THE FIFTH CIRCUIT COURT CASE OF COOPER V. ALLEN, 467 F. 2D 836, 840 (5TH CIR. 1972), A CASE OF INDIVIDUAL DISCRIMINATION IN WHICH THE FIFTH CIRCUIT APPLIED THE CLEAR AND CONVINCING EVIDENCE RULE TO AN INDIVIDUAL CASE AFTER DENYING A CLASS ACTION.

The creation of a new standard for the burden of proof of a proven discriminator is in direct conflict with Keyes V. School District No. 1. Denver, Colorado, 93 S. Ct. 2698 (1973), Baxter V. Savannah Sugar Refining Corp., 495 F. 2d 437 (5th Cir. 1974); Bundy v. Jackson, 641 F. 2d 934 (D.C. Cir. 1987); and Day V. Matthews, 530 F. 2d 1083 (D.C. 1976). Both Bundy and Day supra cited Baxter V. Savannah Sugar Refining Corp., supra, in support of applying the clear and convincing evidence rule.

Be that as it may, there are not cases saying that the clear and convincing evidence rule should be limited to class actions cases. Prior to the case at bar, the Fifth Circuit applied the rule in individual cases. See Cooper V. Allen, supra. This Court should examine this matter and reverse the Court and correct this matter before it becomes widespread.

II. THE DISTRICT COURT AND THE FIFTH CIRCUIT COURT OF APPEALS EXCEEDED THEIR AUTHORITY UNDER FEDERAL RULES OF CIVIL PROCEDURE RULE 56 BY DISMISSING ALL 16 OF PETITIONER'S PROMOTIONAL AND DISPARATE TREATMENT CLAIMS WHEN RESPONDENT ONLY RAISED FOUR PROMOTIONAL CLAIMS IN ITS PARTIAL MOTION FOR SUMMARY JUDGMENT AND NO DISPARATE TREATMENT CLAIMS IN VIOLATION OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT THE COURT DID NOT GIVE PETITIONER NOTICE AND AN OPPORTUNITY TO BE HEARD; NEITHER PARTY REQUESTED FOR A DISMISSAL OF THESE CLAIMS; THE PARTIES WERE NOT ALLOWED TO SUBMIT EVIDENCE AS TO THE ABSENCE OR PRESENCE OF ANY GENUINE ISSUES OF MATERIAL FACTS AND THE FACTS AND CIRCUMSTANCE OF EACH OF THE 12 PROMOTIONAL CLAIMS AND ALL OF THE DISPARATE TREATMENT CLAIMS ARE SUBSTANTIALLY DIFFERENT.

This issue is of exceptional public importance because the Court has calculated a scheme to deny parties' access to the Court by violating the 14th Amendment to the United States Constitution due process clause. This Court should eradicate this practice before it becomes pervasive. This decision is in

direct conflict With Celotex Corp. V. Catrett, 477 U.S. 317, 326 (1986); Betty V. Williamette Industries, Inc., 172 F. 3d 123 (11th Cir. 1999); Witt V. Roadway Exp., 136 F. 3d 1424 (10th Cir., Cert. Denied 119 Sup. Ct. 188 (1998); Smith V. Brenoettory, 158 F. 3d 908 (5th Cir. 1998); Das V. Riverwest, 152 F. 3d 471 (5th Cir., Cert. Denied 119 S. Ct. 2411 (1998); and Morris V. Coven World Wide Moving, Inc., 144 F. 3d 377 (5th Cir. 1998). This Court should reverse this decision with instructions and stop this practice before it becomes pervasive.

III. THE COURT OF APPEALS AND THE DISTRICT COURT COMMITTED PATENT ERROR BY DISMISSING PETITIONER'S DISPARATE E TREATMENT CLAIMS WHICH WAS NEVER RAISED IN RESPONDENT'S MOTION AND PETITIONER'S RETALIATION CLAIMS BY CONFUSING DISPARATE TREATMENT WITH RETALIATION CREATING A CONFLICT AND CONFUSION IN THE FIFTH CIRCUIT DECISIONS OF RUTHERFORD V. HARRIS COUNTY TEX., 197 F. 3D 173, 184 5TH CIR. 1999) AND SHACKLEFORD V. DELOITTE & TOUCHE, 194 F. 3D 398, 406-407 (5TH CIR, 1999).

The Respondent did not raise the disparate treatment issues in its partial summary judgment. The Trial Court's decision is void of anything pertaining to resolving the issue of disparate treatment. Petitioner filed EEOC complaints because Respondent prevented her from having equal employment opportunities. There is a distinction between retaliation, disparate treatment, ultimate employment decision, and adverse employment action. Disparate treatment is the employer treating Petitioner less favorably than her white counterpart because of her race, sex, religion, age, or national origin. See International Board of Teamsters V. United States, 421 U.S. 324 (1977); Lehman V. Prudential Insurance Co., 74 F. 3d 323

(1996); HUGULEY V. General Motors Corp., 52 F. 3d 1264 (1995). The Courts dismissal of Petitioner's disparate treatment claim is an error of substantial prejudice to Petitioner when the record shows clearly that Respondent filed a partial motion for summary judgment in which this issue was not raised and the astute judges knew it. The Courts dismissed Petitioner's entire case without deciding the disparate treatment claims, which are supported by evidence in the record the same as the Respondent's evidence in the record since there was no depositions or oral testimony given in which either party had the opportunity to cross exam. Thus, the Petitioner had only to show that she suffered an adverse employment action for her disparate treatment claims. Petitioner only must show that Respondent took actions which tend to have an adverse effect on the terms, benefits, or responsibilities of her employment. The jurisprudence shows that an action which would tend to have an adverse employment effect is something less than an ultimate employment decision. A disparate treatment claim involves something less than hiring, granting leave, discharging and promoting. See Rutherford V. Harris County, Tex., 197 F. 3d 17s, 184 (5th Cir. 1999); and Shackleford V. Deloitte & Touche, 190 F. 3d 398, 406-407 (5th Cit. 1999).

Hence, it is explicit that this unprinted unpublished decision is in conflict with prior decisions of this Court and should be reversed and remanded with instructions because of the substantial prejudice the error has caused. This is a total contradiction to Rule 56 of the Federal Rule of Civil Procedure. See Wagner V. Taylor, 836 F. 2d 566 (D.C. Cir. 1977); Kim V. Nash Finch Co., 123 F. 3d 1046 (8th Cir. 1997) and Forsyth V. City of Dallas, 91 F. 3d 169 (5th Cir. 1996).

Hence, this Court should reverse and remand the Court's decisions and clarify the issues of the distinction between retaliation, disparate treatment, ultimate employment decisions, and adverse actions because this matter is affecting nationwide plaintiffs.

CONCLUSION

For all the reasons identified herein, a Writ of Certiorari should be issued to review the decision of the United Stares Court of Appeals For The Fifth Circuit and, ultimately to vacate and reverse the final judgment below and remand the matter to the District Court with instructions and for a trial by jury.

Respectfully Submitted,

James C. Ferguson, Esquire
343 Third Street, Suite 410
Baton Rouge, LA 70801
Phone (225) 346-8608
Bar No. 5519

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-30929

VIVIAN PIPER,
Plaintiff-Appellant,

VERSUS

ANN VENEMAN, Secretary, Department of Agriculture,
National Finance Center,
Defendant-Appellee.

Appeal from the United States District Court For the Eastern District of Louisiana (98-CV-3647-L)

Before EMILIO M. GARZA and PARKER, Circuit Judges, and ELLISON, District Judge.*
ROBERT M. PARKER, Circuit Judge:**

Plaintiff Vivian Piper appeals the summary judgment awarded defendant Daniel Glickman, Secretary, Department of Agriculture, National Finance Center ("NFC"), in her employment discrimination suit. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Piper, an African-American female, is a Systems Accountant at NFC's office in New Orleans, Louisiana. She has been employed there since June 1974 and in her current position since 1985. She brought suit pursuant to Title VII of the Civil Rights Act of 1964, codified in 42 U.S.C. § 2000(e) *et seq.*, alleging that NFC discriminated against her because of her race, sex, and age,[1] and retaliated against her because of her prior complaints to the Equal Employment Opportunity Commission ("EEOC")

On August 27, 1980, Piper filed a formal complaint against NFC alleging that NFC had discriminated against her because race, sex and in reprisal for her previous EEOC activities. She specifically alleged that she was not selected for promotion; she was denied training; part of her job duties were transferred to others; she was harassed by. her supervisor; she was denied overtime assignments; and she received a low performance rating. On September 25, 1985, the EEOC entered a finding of discrimination with regard to NFC's issuance of Piper's performance appraisal, her non-promotion, and the denial of overtime. NFC was directed to promote Piper to the position of Supervisory Operating Accountant, reimburse her for the overtime pay she would have received absent discrimination and take appropriate disciplinary action against the decision-makers at NFC who were responsible for the discrimination. *See Piper v. Department of Agriculture,* Appeal No. 01832501 (EEOC Office of Review and Appeals Sept. 25, 1985)

Piper filed suit against NFC in federal district court in 1991, alleging that NFC had continued to discriminate against her. The parties reached a settlement agreement and an agreed judgment of dismissal was entered on June 22, 1994.

Piper filed the present suit in December 1998, alleging that she was denied promotions because she is African-American, female and is perceived as a trouble-maker for filing 32 EEOC complaints and a law suit against NFC. She also claimed that she had been given a low performance rating and improper evaluations, denied cash awards, passed over for promotions while other employees with lesser qualifications were promoted, evaluated with subjective criteria, given fewer job responsibilities, and reassigned to positions outside her line of work.

Defendants moved for summary judgment. The district court found that the summary judgment evidence, taken in the light most favorable to Piper, supported a prima facie case of discrimination and retaliation as to her failure to promote claims. Although was unclear whether her allegations of other discriminatory and retaliatory acts by NFC were independent claims, the district court held that none of them were ultimate employment actions protected by Title VII, citing *Schackelford v. Deloitte & Touche, LLP*, 190 F.3d 398, 406-07 (5th dir. 1999).

The burden then shifted to NFC to articulate a nondiscriminatory reason for failing to promote Piper. NFC explained that other candidates were better qualified for the positions to which Piper applied. First, NFC explained that it awarded a position of Chief of Payroll/Personnel Branch (NFC 97-004) to a candidate who had nineteen years of supervisory experience, seventeen of which were in the payroll/personnel area. Also the selectee had been acting as a branch chief in his supervisor's absence. In 1996, NFC selected another candidate with nineteen years of relevant experience for the position of supervisory Systems Accountant (NFC 95-087) who had also been section head for the branch for the eight preceding years. The individual chosen for the position of Branch Chief of the Accounting Reconciliation Branch (NFC 94-017) had served as section chief for six years. The selecting official for the position of Supervisory Systems Accountant (NFC 93-044) was an African-American female who chose a candidate with seven years of specific experience and strong analytical skills. For the position of Accounting Reporting Branch Chief (NFC 97-064), NFC promoted an African-American female with eighteen years of experience in the Accounting Reporting Branch and nine years of supervisory experience as a section head. A sixteen-year veteran who had managed and supervised the Billings and Collection Branch was chosen for the position of Billings and Collections Branch Chief.

Finally, NFC stated that an individual with nineteen years of experience with the Payroll Accounting Section was chosen to be head of Payroll Accounting Section (NFC 97-045)

The district Court determined that NFC's articulation of non-discriminatory reasons for not promoting Piper shifted the burden back to Piper to demonstrate that the reasons given were pretextual. After considering Piper's allegations and summary judgment evidence, the district court found that the evidence did not raise a genuine issue of material fact concerning whether the defendant's non-discriminatory explanations were pretextual. Piper had only one year of supervisory experience while each of the other candidates served from nine to nineteen years as supervisors. Contrary to Piper's allegations, NFC selected both women and African-Americans for supervisory positions. In fact, one supervisor who did not select Piper for a promotion is herself an African-American woman.

Finally, the district court held that the evidence does not support Piper's retaliation claim. The court determined that she was not promoted because she *was* not as well-qualified as other candidates, and she had offered only her belief that she was denied a promotion because of her prior EEOC complaints. Even if he history of discrimination complaints contributed to the decisions not to promote her, the district court held that she cannot establish liability for unlawful retaliation if NFC would have denied her promotions notwithstanding her complaints to the EEOC, citing *Long v. Eastfield College,* 88 F.3d 300, 305 n.4. (5th Cir. 1996)

II. ANALYSIS

A. Standard of Review

We review a grant of summary judgment de *novo* and apply the same standards as the district court. *Benningfield* v. City *of Houston,* 157 F.3d 369, 374 (5th Cir. 1998) . If the summary judgment evidence shows that there is no genuine

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law, the summary judgment entered by the district court will be affirmed. *See* Fed. R. Civ. P. 56(c)

B. Proof of Past Discrimination

Piper contends on appeal that the district court erred in by failing to properly consider NFC's past discrimination against her.

First, Piper argues that the Title VII burden-shifting construct articulated in *McDonnell Douglas Corp. v.* Green, 411 U.s. 792, 802 (1973), and *Texas Dep't of Community* Affairs *v. Burdine,* 450 U.S. 248, 249-50 (1981) , must be modified in this case because NFC had discriminated against her in the past. Piper reasons that once she made out her prima facie case and proved that NFC had previously discriminated against her, the burden shifted to NFC to prove by clear and convincing evidence (rather than preponderance of the evidence) that its decisions regarding her employment were motivated by legitimate, non-discriminatory reasons. For this proposition, she relies on a line of cases stemming from *Keyes v. School District No. 1,* 413 U.S. 189 (1973) . In *Keyes,* the Supreme Court "thrust upon the School Board the burden of justifying its conduct by clear and convincing evidence" because the school had a history of segregation coupled with the discharge of a large number of African-American teachers incident to desegregation. *Id.* At 209. The Fifth Circuit has required local boards of education to meet the stringent *Keyes* evidentiary burden when plaintiffs have proved an immediate past history of racial discrimination in a recently desegregated school district. *See Lee v. Conecuh County Board of Education,* 634 F.2d 959, 963 (5th Cir. 1981) ; *see also Lee v. Washington County Board of Education,* 625 F.2d 1235, 1237 (5th Cir. 1980) . Although this circuit has imposed a similar burden in Title VII class action cases, *see Baxter v. Savannah Sugar Refining Corp.,*

495 F.2d 437 (5th Cir. 1974), that burden is not applicable in the context of individual discrimination cases.

Keyes and its progeny shifted the burden of persuasion in cases where the defendant had a history of discrimination and where significant numerical disparities existed in the employer's treatment of minority employees. Piper's case does not fall into that category of cases. Piper alleges, instead, that NFC has a history of discriminating against her personally. The Supreme Court has consistently held that the ultimate burden of persuading the trier of fact that the defendant discriminated against plaintiff in an individual, disparte-treatment case remains at all times with the plaintiff. *Burdine*, 450 U.S. at 256. We therefore find that the district court did not err in rejecting Piper's *Keyes* analysis.

In related grounds of err, Piper cpmplains that the district court failed to adequately take into consideration NFC's predisposition toward discrimination which she established by proffering evidence that NFC had previously discriminated against her. As the district court noted, Piper did not offer evidence which refuted the district court's conclusion that the individuals who were selected for promotions were better qualified for the positions than she was. *See Nichols v. Loral Vought Systems Corp.*, 81 F.3d 38, 42 (5th Cir. 1996) (holding that in order to rebut employer's articulated non-discriminatory reason that plaintiff was not as well-qualified as the workers that employer had selected, plaintiff must offer sufficiently specific basis for claim that he was in fact the better-qualified worker). Moreover, one of the promoted employees was African-American, another was female, and one of the selecting officials in another promotion was an African-American female. We find no error in the district court's view of the evidence.

C. Interim change in Title VII law

The district court filed its Order and Reasons on June 7, 2000, and the Final Judgment on June 14, 2000. In the

interim, on June 12, 2000, the Supreme Court resolved a split among the circuits on the issue of whether a defendant is entitled to judgment as a matter of law where a plaintiff's case consists only of a prima fade case under *McDonnell Douglas* and sufficient evidence for a reasonable trier or fact to reject the defendant's legitimate, non-discriminatory explanation for its decision. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 140 (2000) . The Supreme Court held that such evidence is sufficient for a plaintiff to withstand a grant of judgment as a matter of law in favor of the defendant. *Id.* at 148. Even if the district court had applied the new *Reeves* standard, Piper's case cannot survive summary judgment because she did not present evidence sufficient for a reasonable trier of fact to reject NFC's nondiscriminatory explanation for its decisions.

D. Actionable Adverse Employment Actions

Piper next alleges that the district erred by focusing only on NFC's failure to promote her and denying her relief on her claims of discrimination and retaliation related to performance evaluations, cash awards, assignment of duties, and supervision by a lower-grade employee. Piper identifies no evidence, and our review of the record has uncovered none, that she suffered any actionable employment actions other than NFC's failure to promote her.

Piper contends in a related argument that she has alleged twelve instances of tangible employment action in addition to the four that the district court examined in detail. Having examined the record, we agree with the district court that the summary' judgment evidence presents no genuine issue of material fact concerning Piper's additional allegations of "non-promotional claims," which consist of her twelve EEOC complaints that did not pertain to NFC's failure to promote her.

III. CONCLUSION

We therefore conclude that the district court did not err in denying Piper relief on her claims for relief based on any of the alleged employment decisions, and we affirm the entry of summary judgment for NFC.

AFFIRMED.

Footnotes

[1]Although Piper mentions that she is asserting an age discrimination claim, that claim is without merit as it was not supported by evidence or argued in the district court or in this court.

[*]District Judge of the Southern District of Texas, sitting by designation.

[**]Pursuant to 5TH Cir. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

2000 WL 748109

(Cite as: 2000 WL 748109 (E.D.La.))

83 Fair Empl.Prac.Cas. (BNA) 363
United States District Court, E.D. Louisiana.

Vivian PIPER

v.

Daniel GLICKMAN, et al.

No. Civ.A. 98-3647.
June 8, 2000.

ORDER AND REASONS

FALLON, J.

*1

(Cite as: 2000 WL 748109, *1 (E.D.La.))

Before the Court is defendants' motion to dismiss and motion for summary judgment. For the foregoing reasons, defendants' motion is GRANTED pursuant to Rule 56 of the Federal Rules of Civil Procedure.

I. BACKGROUND

Plaintiff Vivian Piper is a Systems Accountant at the National Finance Center in New Orleans, Louisiana. She has been employed there since 1974 and in her current position since 1985. She claims that her employer, the Department of Agriculture, discriminated against her because of her race, sex, age, and her prior complaints to the EEOC in violation of 42 U.S.C. § 2000(e), et seq. (Title VII). [FN1]

FN1. Prior to this suit, Piper brought an administrative complaint of discrimination with the EEOC in 1985 and subsequently filed a law suit in this court which was settled in 1992. Piper contends that the defendant continued to discriminate against her and did not adhere

to the terms of the settlement. She attests that she has filed thirty-two additional administrative complaints in addition to this suit which have been dismissed because of her claim in this court.

Specifically, Piper alleges that she was denied promotions because she is black, female, and is perceived as a trouble maker for filing EEOC complaints and a law suit against her employer. She additionally claims that she was given a low performance rating and improper evaluations, denied cash awards, passed for promotions while other employees were promoted with lesser qualifications, evaluated with subjective criteria, given fewer job responsibilities, and was reassigned to other positions. Piper seeks two forms of protection under Title VII. First, she claims to be a member of a class protected by Title VII (African American and female) who has been discriminated against. Second, she claims to have suffered retaliation from her employer after engaging in an activity protected by Title VII (filing complaints with the EEOC).

II. SUMMARY JUDGMENT STANDARD

To overcome summary judgment, Piper must establish a prima facie case of discrimination and a prima facie case of retaliation. For her first claim of race and sex discrimination, she must show that "(1) she is a member of a protected class; (2) she sought and was qualified for an available employment position; (3) she was rejected for that position; and (4) the employer continued to seek applicants with the plaintiff's qualifications." Scales v. Slater, 181 F.3d 703, 709 (5 th Cir.1999). For her second claim of retaliation, she must first demonstrate that 1) she engaged in a protected activity; 2) her employer took adverse employment action against her; and, 3) a causal connection between the protected activity and the adverse

employment action exists. See Burger v. Central Apartment Management, Inc., 168 F.3d 875, 878 (5 th Cir.1999).

If Piper can establish a prima facie for one or both claims, then the burden shifts to the defendant who must articulate a legitimate nondiscriminatory reason for the challenged employment action. See Scales, 181 F.3d 709; Shackelford v. Deloitte & Touche, LLP, 190 F.3d 398, 408 (5 th Cir.1999). If this occurs, the burden then shifts back to the plaintiff to demonstrate that the defendant's nondiscriminatory explanations are pretextual. See Scales, 181 F.3d at 709 (explaining that to show pretext plaintiff must provide evidence demonstrating that the asserted reason was false and that discrimination was the actual motivation); Shackelford, 190 F.3d at 408. In short, if the defendant introduces evidence which, if true, would permit the conclusion that the adverse employment action was nondiscriminatory, the focus shifts to the ultimate question of whether the defendant unlawfully retaliated against Piper. See Haynes v. Penzoil Co., 207 F.3d 296, 299 (5 th Cir.2000).

*2

(Cite as: 2000 WL 748109, *2 (E.D.La.))

Piper may avoid summary judgment on her discrimination claims only if the evidence taken as a whole creates a fact issue as to whether the defendants' acted on the basis of their proffered nondiscriminatory reason and if the evidence is sufficient to create a reasonable inference of discriminatory intent. See Grimes v. Texas Dept. of Mental Health & Mental Retardation, 102 F.3d 137, 141 (5 th Cir.1996). In order to defeat summary judgment on her retaliation claim, "the plaintiff must show that the protected conduct was a but for cause of the adverse employment action. See Scrivner v. Socorro Ind. School District, 169 F.3d 969, 972 (5 th Cir.1999). No liability exists if the plaintiff would not have been promoted even in

the absence of her prior complaints of discrimination. See Long v. Eastfield College, 88 F.3d 300, 305, n. 4 (5 th Cir.1996).

III. ANALYSIS

Defendants first argue that Piper's various claims should be limited to those related to her allegation of failure to promote. The Fifth Circuit limits redress for adverse employment actions to those that affect a narrow field of ultimate employment decisions. See Burger, 168 F.3d at 878. "Ultimate employment decisions include acts such as hiring, granting leave, discharging, promoting, and compensating." Id. (quoting Mattern v. Eastman Kodak Co., 104 F.3d 702, 705 (5 th Cir.1997), cert. denied, 522 U.S. 932 (1997)).

Piper raises allegations of several discriminatory and retaliatory acts by the defendants in her complaint. See Pl.'s Compl. ¶ xi-xiv. It is unclear whether these allegations garnish her claim of failure to be promoted or whether the plaintiff urges them as independent claims against the defendants. To the extent plaintiff offers them as independent claims on a separate basis, these claims must be dismissed because they do not constitute ultimate employment actions. See Schackelford, 190 F.3d at 406-07 (finding that a denial of employee training is not an adverse employment action protected by Title VII discrimination provisions); Dollis v. Rubin, 77 F.3d 777, 782 (5 th Cir.1995) (finding that Title VII protections were designed to address only ultimate employment decisions). Therefore, Piper may only pursue discrimination claims that constitute ultimate employment actions, i .e. a failure to promote.

Piper claims that she did not receive promotions because of her race, sex, and her complaints to the EEOC. With regard to her discrimination claim, Piper establishes a prima facie case of discrimination. She is an African-American woman and therefore a member of a

protected class. Having worked for the National Finance Center since 1974 and having received other promotions, Piper supports her claim that she was qualified for several available positions for which she was denied promotions in favor of other applicants with similar experience.

The burden then shifts to the defendant who offers a nondiscriminatory reason for failing to promote Piper. Defendant explains that several other candidates were better qualified for the positions to which Piper applied.

First, the defendants explain that the NFC awarded a position of Chief of Payroll/Personnel Branch (NFC 97-004) to a candidate who had nineteen years of supervisory experience, seventeen of which were in the payroll/personnel area. The selectee also had been acting as a branch chief in his supervisor's absence. In 1996, the defendants selected another candidate with nineteen years of relevant experience for the position of Supervisory Systems Accountant (NFC 95-087) who had also been section head for the branch for the eight proceeding years. The individual chosen for the position of Branch Chief of the Accounting Reconciliation Branch (NFC 94-017) had served as section chief for six years. The selecting official for a position as Supervisory Systems Accountant (NFC 93-044) was an African-American female who chose a candidate with seven years specific experience and strong analytical skills. For a position as Accounting Reporting Branch Chief (NFC 97-064), the defendants promoted an African- American female with eighteen years experience in the Accounting Reporting Branch and nine years supervisory experience as a section head. A sixteen year veteran of who had managed and supervised the Billings and Collection Branch was chosen for the position of Billings and Collections Branch Chief. Finally, the defendants state that an individual with nineteen years experience with the Payroll Accounting Section was chosen to be Head of

Payroll Accounting Section (NFC 97-045).
*3

(Cite as: 2000 WL 748109, *3 (E.D.La.))

The defendants, having introduced evidence that indicates the conclusion that the adverse employment action was nondiscriminatory, shift the burden back to the plaintiff to demonstrate that their nondiscriminatory explanations are pretextual. See Scales, 181 F .3d at 709. Piper responds that she was the only employee at her pay level not in a supervisory position and that all supervisory accounting positions except one are occupied by white males. She claims never to have been invited to staff branch meetings. Moreover, she attests that black accountants are rarely promoted to a managerial level except when they seek EEO action.

The Court finds that the evidence does not support a conclusion that the defendant's nondiscriminatory explanations are pretextual. Piper had only one year of supervisory experience while each of the other candidates served from nine to nineteen years as supervisors. Contrary to Piper's allegations, the defendants did select both women and African Americans to supervisory positions. In fact, one supervisor who did not select Piper for a promotion is herself an African-American woman. Therefore, the plaintiff fails to provide sufficient evidence to create a reasonable inference of discriminatory intent.

The evidence also does not support Piper's retaliation claim. She offers only her belief that she was denied a promotion because of her prior EEOC complaints. She fails to provide evidence to show that the defendants failed to promote her because of her discrimination claims. Piper's burden of demonstrating the existence of a genuine issue of fact to defeat summary judgment cannot be met by unsubstantiated assertions. See Grizzle v. Travelers Health Network, Inc., 14 F.3d 261, 268 (5th Cir.1994) (noting an employee's self-serving generalized

testimony stating her subjective belief that discrimination occurred is insufficient to support a jury verdict in plaintiff's favor). The Court must "resolve factual controversies in favor of the nonmoving party, but only when there is an actual controversy, that is, when both parties have submitted evidence of contrary facts." See Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5 th Cir.1994) (quoting Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586 (1986)). If the evidence leads to only one reasonable conclusion, summary judgment is proper. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). In this case, the evidence demonstrates that Piper was not promoted because she was not as well qualified as other candidates. Even if Piper's history of discrimination complaints contributed to the decisions not to promote her, she cannot establish liability for unlawful retaliation if her employer would have denied her promotions notwithstanding her complaints to the EEOC. See Long, 88 F.3d at 305, n. 4.

IV. CONCLUSION

For the foregoing reasons, defendants' motion to dismiss and motion for summary judgment is GRANTED pursuant to Rule 56 of the Federal Rules of Civil Procedure.

E.D.La.,2000.

Piper v. Glickman

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 98-3647
SECTION MAG. 5

VIVIAN PIPER

VERSUS

DANIEL G. GLICKMAN DEPARTMENT OF AGRICULTURE, NATIONAL FINANCE CENTER

COMPLAINT

I.
NATURE OF CASE

This is an action brought by Vivian Piper, hereinafter referred to as plaintiff, seeking relief from numerous acts of race discrimination, sexual discrimination, age discrimination, and reprisal for filing lawsuits and numerous EEO Complaints against defendants pursuant to 42 U.S.C. § 2000-e, et seq. as amended in 1991 on the basis of disparate treatment.

II.

That this Court has jurisdiction pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 2000.e, et. seq. as amended in 1991.

III.

That Vivian Piper, plaintiff is a black female, who is a citizen of the United States of America and the State of Louisiana.

IV.

That made defendant herein is Daniel C. Glickman, Secretary Department of Agriculture, National Finance Center, a United States Agency located in New Orleans, Louisiana.

V.

That plaintiff has been employed by the defendant at National Finance Center since June, 1974. Plaintiff is currently employed or classified ad a Systems Accountant with the defendant since 1985. Plaintiff is currently GS-510-13.

VI.

That in the past, the plaintiff has brought unlawful discrimination actions against defendant on the basis of disparate treatment and retaliation for her prior EEO protected activity. A favorable decision was rendered in plaintiff favor by the Administrative Tribunal on September 25, 1985 in Vivian Piper vs. Department of Agriculture; Appeal No. 01832501 U.S. Equal Employment Opportunity Commission.

VII.

That since the favorable Administrative decision for plaintiff in 1985, defendant has an ongoing campaign of reprisal and discrimination against the plaintiff.

VIII.

That the acts of defendant resulted in the plaintiff filing suit in the United States District Court For The Eastern District of Louisiana entitled Vivian Piper vs. Michael Espy, Secretary of The Department of Agriculture; Civil Action No. 911582, Section "E" (3).

IX.

That the matter of Vivian Piper vs. Michael Espy, supra, was settled in the Spring of 1994 and dismissed on June 22, 1994.

XI.

That after the dismissal of this lawsuit, the defendant continued to commit acts of reprisal against the plaintiff by not living up to all the terms of the settlement agreement with the plaintiff, which it turn caused the plaintiff to file an other EEO complaint against defendant before the dismissal of the lawsuit got cold.

XII.

That the defendant on numerous occasions committed the patterned practice of placing white employees in acting positions where they could gain experience in jobs and be promoted in them by the use of special criteria; whereas, the plaintiff was denied these equal employment opportunities because she was black, female, and was considered a trouble maker because of her filing of prior EEO Complaints and a discrimination lawsuit against the defendant.

XIII.

That to humiliate the plaintiff with acts of reprisal, the defendant engaged, in the pattern and practice of using lower grade employees over the plaintiff because of plaintiff's EEO activity.

XIV.

That defendant has used also the pattern and practice of denying plaintiff promotions by giving plaintiff consistent law performance and improper evaluations, denying plaintiff cash awards, and promoting employees with less qualifications, pre-selecting employees for vacant positions, use of subjective criteria which are not set forth in the job announcements to deny plaintiff's promotions, taking away

plaintiff's job responsibilities, reassigning plaintiff to other positions outside of her line of work placing plaintiff in hazardous work environment and other factors disparate treatment, discrimination on the basis of race, sex, and age; retaliation or reprisal for filing of EEOC complaints and lawsuits against the agency.

XV.

That since the settlement of plaintiff's lawsuit, the plaintiff has had to file the following complaints and more than 180 days have elapsed since the filing of these complaints:

a) 950118-Untimely non/compliance with lawsuit settlement Agency #940916;

b) 950213-Assignment of duties, job description, and non/selection on the basis of race, and sexual discrimination, and reprisal for 3-GS13 position, non recognition an accountant, supervised by a lower grade employee, and others; The non selection was made on NFC9304 vacancy announcement:

c) 950821-Non selection NFC-Vacancy Announcement 94-017 GM14 Supervisory Systems Accountant. Race, sex, and reprisal;

d) 951106-Reassignment, job transfer, and reprisal;

e) 951128-Job performance evaluation for 1993, 1994, and 1995 not rated, job duties, working condition, and management;

f) 950509-Non selection for Supervisory Systems Accountant GS-14 NFC 97-004 Selectee white male;

g) 951204-Reassignment to analysis system, performance evaluation September, 1994 to September, 1995; working condition, sign in sign out sheets, and acting duties assignment or denial to act as Supervisor from October, 1995 to February, 1996;

h) 960911-Cash Award

i) 96048-Performance Appraisal

j) 960301-Non selection for Supervisory System Accountant GS-14 NFC Vacancy Announcement 95087 Accounting Reconciliation Branch Chief;

k) 960226-Working condition

l) 960401-Performance evaluation October 1, 1995 to September 30, 1996;

m) 960617-Retaliation and working conditions;

n) 960708-Pattern of harassment; reassignment of duties, and etc.

o) 960801-Unfair treatment from OCRE New Orleans Office;

p) 961030-Job assignments, training, and reprisal;

q) 960569;

r) 951370;

s) 952870;

t) 960186;

u) 960221;

v) 960222;

w) 960519;

x) 970442;

y) 970887;

z) 980179;

aa) 980260;

bb) 980313;

cc) 980899;

dd) 980900;

ee) 960771; and,

ff) Other complaints filed but not listed.

XVI.

That plaintiff herein does not have to exhaust administrative remedies because plaintiff has filed her complaints more than 180 days with the administrative tribunal and the agency.

XVII.

That as a result of the defendant's actions, the plaintiff has incurred the following damages:

a) Past, present, and future mental anguish, emotional distress, embarrassment, humiliation, and loss of enjoyment of life; life;

b) Loss wages or back pay for failure to promote;

c) Past, present, and future medical expenses;

d) Attorney fees and costs.

XVIII.

That plaintiff desires and requests a trial by jury.

WHEREFORE, plaintiff prays that defendant be duly served and cited to appear; and after lapse of all legal delays and due proceedings had, let there be judgment herein in favor of plaintiff and against defendant upon the premises set forth herein with legal interest from date of judicial demand until paid and for all costs of these proceedings; plaintiff be allowed a trial by jury; and, for all general and equitable relief.

Respectfully Submitted

BY:
James C. Ferguson, Esquire
343 Third Street, Suite 410
Baton Rouge, Louisiana 70801
Bar No.: 5519
Phone 225-345-8608

DEPARTMENT OF AGRICULTURE EEO COMPLAINT FINAL DECISION

Complainant: Vivian Piper

Complaint Nos.:	940916 (CR960569); 950213 (CR951370); 950821 (CR952870); *951204* (CR960186); 960226 (CR960221); 960301 (CR960222); 960408 (CR960519); 960708(CR960771); 970442; 970887; 980179; 980260; 980313; 980899; 980900[1]; 990144; 990216; and 990272
Agency:	National Finance Center
Issues:	Low Performance Evaluations; Denial of Cash Award; Nonselection; Failure to Promote; Removal of Duties; Reassignment; Working Conditions; and Failure to Provide Training
Bases:	Race (Black), Sex (female), Age (9-20-47) and Reprisai

DECISION

The issues and allegations raised in these complaints are dismissed because on December 9, 1998, a civil action was filed in the U.S. District Court, Eastern District of Louisiana, which included the same issues as those raised in the above complaints. The regulatory basis for this decision is found at Title 29 Code of Federal Regulations (C.F.R.), §1614.107(c).

STATEMENT OF THE CASE

The complainant has cited the following fourteen (14) formal complaints of discrimination in the civil action:

Complaint: 940916 (CR960569)

Allegation: On November 4, 1992, the complainant filed the above formal complaint. On May 12, 1994, the complainant entered into a settlement agreement as a plaintiff in a civil action filed in the U.S. District Court, Eastern District of Louisiana. On September 13, 1994, the complainant alleged that the agency breached the settlement agreement. (The complainant identifies this complaint as "950118" in the civil action. Additionally, it appears that the issue of "cash award," which the complainant identifies as case number "960911," is associated with this complaint[2].)

Complaint: 950213 (CR951370)

Allegation: On February 7, 1995, the complainant filed the above formal complaint regarding assignment of duties from June 1994, to the date of the complaint; being supervised by lower grade employees; not being recognized as a Systems Accountant GS- 13; and nonselection for three supervisory Systems Accountant positions for which applications were filed in September 1993.

Complaint: 950821 (CR952870)

Allegation On August 10, *1995,* the complainant filed the above formal complaint regarding nonselection for a Supervisory Systems Accountant position, GS-510-14, under vacancy announcement number NFC 94-017.

Complaint: 951204 (CR960186)

Allegation: On November 28, 1995, the complainant filed the above formal complaint regarding reassignment to the Payroll/Personnel Analysis Section in October 1995 (to include the work area); failure to provide performance appraisal for 1995 and circumstances involved; working conditions from October 1995 to December *1995,* to include request to sign in/out; and denial of an opportunity to "Act" in her supervisor's absence. (The complainant also identifies this complaint as *"951* 128" in the civil action. The issue regarding not receiving a performance rating for 1993 and 1994 was dismissed by a final agency decision.)

Complaint: 960226 (CR960221)

Allegation On February 26, 1996, the complainant filed the above formal complaint regarding being moved to an inferior office space.

Complaint: 960301 (CR960222)

Allegation: On March 1, 1996, the complainant filed the above formal complaint regarding nonselection for a Supervisory Systems Accountant position, GS-510-14, under vacancy announcement number NFC-95-087.

Complaint: 960408 (CR960519)

Allegation: On April 4, 1996, the complainant ified the above formal complaint regarding receiving a performance appraisal summary rating of "fully successful," dated February 29, 1996, for the appraisal period of October 1, 1994 to

September 30, 1995.

Complaint: 960708 (CR960771)

Allegation: On July 8, 1996, the complainant filed the above formal complaint regarding a pattern of harassment beginning with a June 14, 1996, letter; assignment of duties; and failure to provide training related to an Analyst position.

Complaint: 970442

Allegation: On May 9, 1997, the complainant filed the above formal complaint regarding nonselection for a Supervisory Systems Accountant position, GS-510-14, under vacancy announcement number NFC-97-004. (The complainant identifies this complaint as *"950509"* in the civil action.)

Complaint: 980179

Allegation: On November 22, 1997, the complainant filed the above formal complaint regarding nonselection for a Supervisory Systems Accountant position, *GS-5* 10-13, under vacancy announcement number NFC-97-045.

Complaint: 980260

Allegation: On December 29, 1997, the complainant filed the above formal complaint as a result of receiving a "fully successful" performance evaluation for fiscal year 1997, on October 30, 1997.

Complaint: 980313

Allegation: On January 28, 1998, the complainant filed the above formal complaint regarding nonselection for two Supervisory Systems Accountant, *GS-510-14,* positions under vacancy announcement numbers NFC-97-061 and NFC-97-064.

Complaint: 980899

Allegation: On August 7, 1998, the complainant filed the above formal complaint regarding a reassignment effective June 22, 1998.

Complaint: 980900

Allegation: On August 7, 1998, the complainant filed the above formal complaint regarding harassment related to the "Project Reconciliation" project; and not being informed that her performance was considered less than adequate.

The complainant identifies four allegations of discrimination in the civil action for which the agency has no record, they are as follows:

Reassignment, job transfer and reprisal[3];

Performance evaluation for the period of October 1, 1995 to September 30, 1996[4];

Retaliation and working conditions[5]; and

Job assignments, training and reprisal[6].

On November 17, 1998, the complainant filed formal complaint number 990144. On December 3, 1998, she filed formal complaint number 990216. On January 5, 1999, she

filed formal complaint number 990272. The issues brought forth in those three complaints were covered by the civil action.

ANALYSIS AND FINDINGS

Incorporated within regulations promulgated by the Equal Employment Opportunity Commission is the concept that dual processing of the same charge is a waste of federal resources. Accordingly, complainants sometimes have choices between forums by which they wish to pursue their concerns, but once such a choice is made, only one avenue is available. One of those choices is to file a civil suit. If a civil suit is filed on the same matter and more than 180 days have passed since filing an EEO complaint without receiving a final agency decision, the EEO complaint must be closed.

On December 9, 1998, the complainant filed a civil suit with the U.S. District Court, Eastern District of Louisiana, Case Number 98-3647. The civil action cites the specific cases identified above and addresses the issues of low performance evaluations; denial of cash award; nonselection; failure to promote; removal of duties; reassignment; working conditions; and failure to provide training.

Since these complaints cover matters that are contained in the civil action, and 180 days have elapsed since the filing of the complaints, it is the final decision to dismiss these complaints because the complainant has raised the same issues in the civil action.

This is the final decision of the Department of Agriculture on the cited complaint or complaints. The following rights are available to challenge this decision:

Appeal to the Equal Employment Opportunity Commission (EEOC)

A Notice of Appeal may be filed with the EEOC at any time up to thirty (30) calendar days after receipt of this decision. EEOC Form 573, EEOC Notice of Appeal, should be used to indicate what is being appealed. A copy of the form is provided with this decision. Such notice should be addressed to:

Director
Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 19848
Washington, DC 20036

If there is an attorney of record, the thirty (30) day time frame within which to appeal shall be calculated from the date of receipt of this decision by the attorney. In all other cases, the time within which to appeal shall be calculated from the date of receipt of this decision by the complainant.

An appeal shall be deemed filed on the day it is postmarked, or in the absence of a postmark, on the date it is received by the EEOC.

Any statement or brief in support of the appeal must be submitted to the EEOC within thirty (30) calendar days of filing the Notice of Appeal.

At the same time information is provided to the EEOC (to include a copy of the Notice of Appeal and of any submissions in support of the appeal), there must be a certification that a copy of the submission has been submitted to the Employment Complaints Division and the date and method of submission. The address is provided below:

U.S. Department of Agriculture

Employment Complaints Division
1400 Independence Avenue, S.W. - Mail Stop 9440
Washington, DC 20250-9440

The thirty (30) day time limit within which to file a Notice of Appeal will not normally be extended by the EEOC. However, the EEOC may, at its discretion, extend the time limit and accept the appeal based upon a written statement that there was no notification of the time limit, or that a timely Notice of Appeal could not be filed due to uncontrollable circumstances.

Civil Action in Federal District Court

In lieu of an appeal to the EEOC, a civil action may be filed in the appropriate U.S. District Court within the following time frames:

(1) within ninety (90) calendar days of receipt of this decision, if no appeal is filed with the EEOC;

(2) within ninety (90) calendar days of receipt of a decision from the EEOC, if an appeal is filed with the EEOC; or

(3) after 180 calendar days from the date of filing an appeal with the EEOC, if there has been no decision issued by the EEOC.

Unless an appeal is filed with the EEOC, failure to file a civil action within ninety (90) calendar days may result in the dismissal of your civil action. Filing a civil action under 29 C.F.R. §1614.408 or §1614.409 shall terminate processing an appeal before the EEOC. If a civil action is filed subsequent to filing an appeal with the EEOC, the parties are requested to notify the EEOC in writing.

If a civil action is filed, the only proper defendant is the Secretary of Agriculture, Dan Glickman. Failure to cite the

proper name and position may result in the dismissal of the civil action. Fed.R.Civ.P. 25(d)(2).

At the same time a civil action is filed, a request may be filed with the Court to appoint an attorney and/or to permit the filing of the civil action without payment of fees, costs, or other security based on an inability to obtain representation or to afford an attorney. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§791, 794(c). The grant or denial of the request is within the sole discretion of the court, and filing such a request does not extend the time frame in which to file the civil action.

Rosalind D. Gray
Director
Office of Civil Rights

Date: 7/14/99

Enclosure

Footnotes

[1]Formal complaints filed prior to 1997, were assigned two case numbers by the Department of Agriculture (USDA). In the civil action the complainant lists these case numbers individually. Therefore, the complainant's list of formal discrimination complaints contains redundant citations.

[2]The complainant has identified complaints with numbers not generated by the USDA.

[3]The complainant identifies this allegation with the number "951106." This is not a number generated by the USDA.

[4]The complainant identifies this allegation with the number "960401." This is not a number generated by the USDA.

[5]The complainant identifies this allegation with the number "960617." This is not a number generated by the USDA.

[6]The complainant identifies this allegation with the number "961030." This is not a number generated by the USDA.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION
NO. 91—1582
SECTION "E" (3)

VIVIAN PIPER

VERSUS

MICHAEL ESPY, SECRETARY OF AGRICULTURE

MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

MAY IT PLEASE THE COURT:

The plaintiff (a black female) brought this action alleging unlawful discrimination on the basis of disparate treatment and retaliation for her prior EEO protected activity in which a favorable decision was rendered in her favor on September 25, 1985, which caused her to be treated different than similarly situated white employees, who had not filed or participated in EEO protected activity.

The defendant is in error by stating that plaintiff cannot set forth a prima fade case of discrimination and retaliation for her EEO protected activity. The defendant is wrong that the management officials responsible for these form promotions positions and cash award decisions long ago articulated legitimate non discriminatory reasons and criteria upon which they made their selections. Plaintiff has shown evidence in her response to defendant's uncontested material facts that these facts are highly disputed because of the contradictory statements made by defendant's management

officials their false statements, their admission that plaintiff's EEO activity played a part in their evaluation, their failure to take into consideration plaintiff's KSAOs and their disparate treatment against the plaintiff. Thus, the Secretary is not entitled to a motion for summary judgment on anyof these claims.

I. RESPONSE TO FACTUAL BACKGROUND

The plaintiff has set forth the disputed facts in reference to her response to the defendant's alleged list of uncontested material facts. Thus, there is no need to repeat these facts at this time.

The plaintiff admits the defendant's topic generally.

II. RESPONSE TO VACANCY ANNOUNCEMENT # 86-24

The plaintiff has shown in her response to defendant's uncontested material facts that Malcom Ledet affidavit is contradictory and contains false statement and unequal application to the criteria set forth for the applicants.

Mr. Ledet contends that he did not select plaintiff because of her limited experience working with system requirements and her demonstrable weakness in written communications, such as her application which was not well written or prepared, containing spelling and grammatical errors. Plaintiff has rebutted the criteria in her response that she had experience working with system requirements that was overlooked by Mr. Ledet. Plaintiff has further shown that Mr. Ledet could not have used written communication because Mr. Estrade, Mr. Millet, and Mr. McCroeen all white selectees had errors in their applications but Mr. Ledet did not apply this criteria to the white employees which is clearly disparate treatment.

Mr. Ledet made a false statement because by his own admission he did not at any time interview the plaintiff as set forth in his affidavit. However, he claimed that he observed further communications deficiencies during Piper's interview, during which she did not response well to questions regarding the knowledge, skills, and abilities for the position in question. This statement is an impossibility and as such constitutes retaliation and disparate treatment because such false actions were not used against the white employees. Hence, it is explicit that this legitimate non discriminatory reason is pretextual.

Plaintiff had further shown that she never worked with Mr. Ledet. Thus, Mr. Ledet would not have any personal knowledge of plaintiff's experience in user requirement skills and plaintiff ability to work well independently. Thus, because of plaintiff's prior EEO activity defendant made adverse decision against her in their use of discriminatory disparate treatment of treating plaintiff different than the white employees.

III. RESPONSE TO VACANCY ANNOUNCEMENT #87-91

The plaintiff has respond to defendant's uncontested material facts to this vacancy and she has shown how the promotion panel retaliated against her for her prior EEO activity by their comment that they used the prior EEO activity as a factor in their evaluation which is clearly reprisal and a violation of Title VII. The defendant has admitted that none of the best qualified candidates had previously participated in protected EEO activity; whereas, the record shows that plaintiff participated in protected activity and it was used against her as a criteria to prevent her from making the best qualified list.

The defendant further retaliated against plaintiff and used disparate treatment because the promotion panel intentionally

failed to include plaintiff's supervisory experience which was set forth in her application and KSAO explicitly. Plaintiff also had involvement in position of management and employee relations as well as assignment and review of work which she also set forth in her KSAO.

The defendant's promotion panel by its reprisal against plaintiff in violation of Title VII made sure that plaintiff would not make the best qualified list which is clearly a violation in which defendant has not set forth any type of legitimate non discriminatory reasons and the defendant have failed to articulate any type of reason for its failure to take the plaintiff KSAO in consideration during its evaluation.

Finally, the panel made a false statement that it was not influence by anyone in their decision making process; whereas, the record shows that they were influenced by plaintiff's prior EEO protected activity. Hence, this statement is pretext or false.

IV. RESPONSE TO VACANCY ANNOUNCEMENT #87-100

Plaintiff never worked with Mr. Ledet and he had no personal knowledge of plaintiff real experience with system requirements, plaintiff had experience with various agencies systems requirements. According to plaintiff, all of the systems requirements were the same. Plaintiff had supervisory experience which Mr. Ledet failed to take into consideration. Plaintiff has already shown that defendant had a practice of giving her low performance evaluations as set forth in her EEO decision and defendant recently changed her ratings. Plaintiff has already shown that Mr. Ledet did not use the criteria of a well written application, containing poor sentence structure and numerous spelling errors as a standard that was applied to white employees. Thus, Mr. Ledet legitimate non-discriminatory reasons are pretextual and is no excuse in his administration of disparate treatment for his

retaliation of plaintiff's prior EEO activity.

V. RESPONSE TO VACANCY ANNOUNCEMENT #87-101

Plaintiff has already respond to the allegations set forth in this vacancy announcement in her response to defendant's uncontested material facts. However, plaintiff will make a few comments in reference to this matter.

Mr. Ledet used a hidden qualification standard. A CPA was not a requirement for this job. The white female selectee only had two (2) years of service with the defendant before her promotion. Plaintiff had supervisory experience and managed a new section. Plaintiff has already shown that defendant had a pattern of giving her low performance evaluations in which defendant has -acknowledge by changing some recent performance evaluations.

Defendant has misinformed the court again that plaintiff did not have any real experience with systems requirements because plaintiff has shown that she has experience with systems requirements. Plaintiff has shown that Mr. Ledet only used spelling errors and poor sentence structure against her and not the similarly situated white employees who had poor sentence structure, applications that were not well written and containing numerous spelling errors which is disparate treatment and reprisal for participating in EEO protected activity.

VI. RESPONSE TO CASH AWARD

Plaintiff has answered the defendant's legitimate non-discriminatory reason that one of the recipients of the cash award had previously processed a discrimination complaint. Defendant failed to reveal that this was a lower grade employee, plaintiff had won a discrimination proceeding against the defendant, the supervisor was one of the discriminating official named in pliantiff EEO complaint for

his participation, plaintiff was given a superior rating and had demonstrated dedication and set a positive example for her fellow employees.

RESPONSE TO QUESTION PRESENTED

The plaintiff has demonstrated prima fade cases of discrimination on the basis of disparate treatment in that she was treated different than similarly situated white employees, and the defendant committed acts of reprisals in her denial of promotions - after her favorable EEO decision on September, 1985 when the reprisal took place in 1986 and 1987 and a promotion panel stated in a comment that plaintiff's prior EEO activity played a part in their decision.

Plaintiff has also shown that discrimination and reprisal took place when she was denied a cash award.

Finally, plaintiff has also shown the pretextuality of the management reasons for their action by pointing out the various activities of false statements, failure to evaluate plaintiff KSAOs, and disparate treatment.

RESPONSE TO ARGUMENT

Defendant is not entitled to a motion for summary judgment in its favor because plaintiff has set forth prima facie cases of discrimination and reprisal for defendant's activity. Plaintiff has shown pretext throughout the denial of promotions and reprisal after plaintiff won her EEO cases.

Rule 56 (c) provides that summary judgment shall be rendered forth with if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

This is a Title VII case in which consideration of intent and motive must come into play. In Hayden v. First National Bank of Mount Pleasant, 595 F. 2d 994 (5th Cir. 1979) the fifth circuit explained that when dealing with employment. discrimination cases, which usually necessarily involve examining motive and intent, as in other cases which involve delving into the state of mind of a party granting of summary judgment is especially questionable. In these cases, summary judgment should be used cautiously and all procedural requirement given strict adherence.

The Fifth Circuit in Thornbrough v. Columbus & Greenville R.R. Co., 760 F. 2d 633 (5th Cir. 1985) stated often motivation and intent can only be proved through circumstantial evidence: determinations regarding motivation and intent depend on complicated inferences from the evidence and are therefore peculiarly within the province of the fact finder. In reviewing a case on appeal, it is difficult to determine what evidence might legitimately sway the fact finder and hence be material. Thus, if any facts are in dispute, summary judgment is generally in appropriate.

Applying Rule 56 (c) and the aforementioned jurisprudential rules to this case, plaintiff has set forth genuine issues of material facts to the extent that a summary judgment should be denied because of the issues of credibility, motive, and intent. The defendant submission of affidavits herein are insufficient especially when the affidavit relied upon contains conflicting statements in which the issue of credibility motive, and intent must be resolved.

Needless to say, this is a disparate treatment case in which plaintiff was denied promotions and a cash award after she won an EEO decision against the defendant in September, 1985 and the on slaught of promotions denials took place shortly there after in 1986 and continued into 1987. The proof of unlawful discrimination under disparate

treatment is that the employer intentionally treated the plaintiff differently than other similar situated employees because of the plaintiff's race, color, national origin, religion, sex or age. In International Board of Teamsters v. United States, 431 U.S. 324 (1977), the Supreme Court explained the disparate treatment model as follows:

"Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

A review of plaintiff's responses to the defendant's alleged uncontested material facts in which most of these material issues of facts are disputed clearly and plaintiff's responses to defendant vacancies announcements clearly shows that this is a case of disparate treatment in reference to all of the promotions which contain genuine issues of material facts denying a summary judgment as set forth in the doctrine of Colotex v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986); Matshushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348 (1986); and Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986 because the plaintiff has used evidence produced by the defendant to prove most of her genuine issue of material facts.

Plaintiff has set forth a prima facie case of retaliation. The defendant has admitted that plaintiff engaged in prior protected EEO activity under Title VII.

Adverse employment actions were taken against the plaintiff when she was denied 4 promotions and a cash award. The defendant treated plaintiff different than similarly

situated employees after plaintiff's participation in EEO activity. There was a casual connection between plaintiff's participation in the aforementioned protected activity, and the adverse employment activity. The defendant's actions explicitly show that plaintiff's prior EEO action give an inference of retaliation. Defendant has not shown any other reasons why it treated and committed disparate treatment against the plaintiff. To illustrate further proof, the promotion panel used plaintiff's prior EEO activity which is documented in their evaluation analysis of plaintiff; whereas, employee who did not participate in prior EEO protected activity was not treated as harshly as the plaintiff. The defendant did not review plaintiff KSAO for the purpose of eliminating plaintiff. The defendant also took reprisal actions against the plaintiff by denying her a cash award and using as a pretext that a lower grade black employee was given an award who had filed in complaint; whereas, plaintiff had won a favorable EEO decision. See Ross v. Communication Satellite, 759 F. 2d 355 (4th Cir. 1985); Hamilton v. Rodgers, *791* F. 2d 439 (5th Cir. 1986) ana DeAnda V. St. Joseph Hospital, 671 F. 2d 850, 856 (5th Cir. 1982).

Furthermore, plaintiff has shown that defendant's legitimate non-discriminatory reasons concerning defendant's actions of retaliation are pretextual of false. Defendant because of the previous findings of discriminatory must prove it reasons by clear and convincing evidence.

Suffice it to say, a charge of discrimination does not effect plaintiff's claims for retaliation since a finding of retaliation does not depend on the merits of the underlying discrimination claim. See Davis v. State University of New York, 802 F. 2d 638 (2nd Cir. 1986); Womack v. Munson, 619 F. 2d 1292 (8th Cir. 1980 Cert den 450 U.s. 979 (1981); and Berg v. LaCrosse Cooler Co., 612 F. 2d 1041 (7th Cir, 1980).

The plaintiff has set forth a prima fade case of racial and sexual discrimination for the defendant's denial of promotion 4 times and defendant used disparate treatment by denying the plaintiff equal employment opportunities in competing for the 4 promotion positions. Plaintiff has set forth facts showing the defendant's action in this case. Thus, under Texas Department of Community Affairs v. Burdine, 450 U.s. 248, 252-53 (1981); and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) the plaintiff herein meets the criteria for a prima facie case under disparate treatment because (1) plaintiff is black and belongs to a protected class (2) plaintiff applied for all of the promotions vacancies and was qualified for all of the vacants positions except one in which the promotion panel use her EEO activity as a factor to exclude her from the best qualified list along with the commission of disparate treatment. (3) plaintiff was rejected for all of the positions; and (4) the defendant selected someone else who did not belong to the same protected class except for 1 or two instances.

The plaintiff has further shown that defendant intentionally treated her different than other similarly situated employees because of her race, sex, and her prior EEO activity. The facts previously adduced plaintiff by show that her employer treated her less favorable in denying her promotions and equal employment opportunities.

The plaintiff has further shown that she was working in a hostile environment in 1986 and 1987. See Plaintiff's Exhibit 2.

Since plaintiff has won an EEO decision against defendant for intentional discrimination, the defendant must prove by clear and convincing evidence that it did not discriminate against the plaintiff for the aforementioned reasons.

The defendant has attempted to set forth legitimate non-discriminatory reasons for its actions by articulating these reasons instead of proving these reasons by clear and convincing evidence because of a finding of intentional discrimination against defendant in the EEO decision of September, 1995. The defendant has not proven its legitimate non-discriminatory reasons by clear and convincing evidence in this disparate treatment case. Assuming arguendo, that defendant has articulated legitimate non-discriminatory reasons, the plaintiff has rebutted same by showing that defendant's reasons are pretextual and some reasons are down right false.

CONCLUSION

Since this case contains genuine issues of material facts and for the other aforementioned reasons, the defendant's motion for Summary Judgment should be denied.

Respectfully Submitted

BY:
James C. Ferguson, Esquire
343 Third Street, Suite 410
Baton Rouge, Louisiana 70801
Bar No.: 5519
Phone (504) 346-8608

CERTIFICATE OF SERVICE

I, hereby certify that a copy of the foregoing opposition to motion for Summary Judgment has been mailed this 25th day of February, 1994 to Glenn K. Schreiber, Esquire, Assistant United States Attorney, Hale Boggs Federal Building , 501 Magazine Street, Room 205, New Orleans, Louisiana 701 30.

James C. Ferguson, Esquire

(Cite as: 1985 WL 568213 (E.E.O.C.))

U.S. Equal Employment Opportunity Commission (E.E.O.C.)
Office of Federal Operations

*1
(Cite as: 1985 WL 568213, *1 (E.E.O.C.))

EEOC APP NO. Vivian Piper
v.
Department of Agriculture September
September 25, 1985

DECISION

INTRODUCTION

On August 4 1983 Vivian Piper (hereinafter referred to as appellant) initiated an appeal to the Equal Employment Opportunity Commission (EEOC) from the final decision of the Department of Agriculture (hereinafter referred to as the agency) rendered July 11, 1983 concerning her equal employment opportunity complaint which alleged discrimination based on race (black), sex (female) and reprisal in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq. The appeal is accepted by this Commission in accordance with the provisions of EEOC Order No. 960, as amended.

BACKGROUND

On August 27, 1980, appellant filed a formal complaint

alleging that she was discriminated against by the agency on the bases of her race (black) and sex (female) and in reprisal for her previous EEO activities when: she was not selected for promotion; she was denied training; part of her job duties were transferred to others; she was harassed by her supervisor; she was denied overtime assignments; and, she received a low performance rating.

The record establishes that appellant (black female) began working for the agency in its National Finance Center (NFC) on June 30, 1974, as an Operating Accountant, GS-9. She was promoted to a GS-11, Operating Accountant, on December 21, 1975. [FN1] In February 1976, appellant was transferred to the then Accounting Control Branch (now Accounting Division, Reconciliation and Control Branch, General Ledger Section) of NFC. Appellant's complaint of 8-27- 80 concerns matters which occurred after her transfer.

The record establishes that the agency announced a vacancy for the new position of Assistant to the Director, GS-301-11 (V.A. No. NFC-77-97), on August 1, 1977. Appellant applied for the position and was not selected. The record establishes that the agency never filled the position.

The record establishes that, in 1977, appellant applies for a position as a GS-12, Operating Accountant, in the Working Capital Fund. [FN2] She was not selected for the position and a white male was selected. Appellant was interviewed by the Chief, Central Accounting Reporting Branch (CAR), the Selecting Official for the position.

According to appellant, she was told by one of the three panel members for the GS-12 position that the selecting official and the Chief of the Accounting Division (AD) had told the panel member to not place appellant's name on the best qualified list (BQL) for the GS-12 position. The panel member denied being told by anyone to not place appellant's name on the BQL. In addition, the other two panel members stated that they were not told by anyone to ensure that appellant's name did not make the

BQL. As it turned out, appellant did make the BQL for the GS-12 position. She was not selected allegedly because she was not the best qualified candidate.

*2

(Cite as: 1985 WL 568213, *2 (E.E.O.C.))

The record establishes that the agency, on September 1, 1980, announced six vacancies for the position of Supervisory Operating Accountant, GS-510-12 (V.A. Nos. NFC-80-165 thru 169). [FN3] Appellant applied for the positions and was not selected. Four white males, one black male and one white female were selected. The record establishes that appellant was on the BQL for each of the six vacancies.

The record establishes that appellant had over 11 years of accounting and auditing work experience, no supervisory experience, a B.S. degree in accounting, two NFC training courses, including Supervision I, and an overall performance evaluation rating average of 3.0 on her most recent evaluation. Selectee #1 (black male) had eight years of work experience, no supervisory experience, a B.S. degree in accounting, was a Certified Public Accountant, had no NFC training courses and had an overall performance evaluation rating average of 3.4.

Selectee #2 (white male) had 4.5 years of auditing work experience, 4.5 years of supervisory experience, an M.B.A. degree, several accounting, auditing and computer courses, no NFC training courses and an overall performance evaluation rating average of 3.4. Selectee #3 (white male) had eight years of work experience, 5.5 years of supervisory experience, a B.S. degree in accounting and was pursuing an M.B.A. degree, had no NFC training courses and had an overall performance evaluation rating average of 3.65.

Selectee #4 (white female) had 16 years of auditing work experience, she was at the GS-12 grade level, had supervisory experience, a B.B.A. degree and 34 courses in

auditing, budgeting and management, no NFC training courses and had an overall performance evaluation rating average of 3.1. Selectee #5 (white male) had eight years of accounting and auditing experience, no supervisory experience, a B.S. degree in economics and accounting, no NFC training courses and an overall performance evaluation rating average of 3.5. Selectee #6 (white male) had eight years of accounting, investigative and auditing work experience, he was at the GS-12 grade level, he had supervisory experience, a B.S. degree in accounting, was a Certified Public Accountant, had no NFC training courses and an overall performance evaluation rating average of 3.63.

The record shows that there were no promotion panels or boards established for the selection process. The applicants were rated and ranked by a Personnel Specialist and the promotion files were provided to the Selecting Officials. The Selecting Officials were: (1) the Chief, AD (white male), for V.A. Nos. 165, 166 and 167; (2) Selecting Official #2 (black male), for V.A. No. 168; and, (3) the Head, Administrative and Claims Section (ACS), for V.A. No. 169.

The Chief, AD, stated that the selections were based on performance evaluations, supervisory comments and his personal knowledge of the applicants' abilities. He stated that he was personally aware of all the candidates' performance records and that he selected the best qualified. *3

(Cite as: 1985 WL 568213, *3 (E.E.O.C.))

The Head, ACS, stated that his selection was based on performance evaluations, work history, training, education and supervisors' comments. He stated that he selected the best qualified candidate for the position.

Appellant alleged that the then Director, NFC, told her she would not be promoted 'until he thought she was ready for him.' [FN4] She stated that, during this

conversation, the then Director was holding her hand and placed his other hand on her shoulder. Appellant stated that she understood his comments to mean that she would be promoted only if she accepted his sexual advances. Appellant stated that the then Director solicited sexual favors from four other agency employees. The then Director denied that he had made any sexual advances towards appellant or that he had implied a promotion would only be forthcoming if she gave him sexual favors. The record does not contain any statements from the four female employees named by appellant as allegedly having given sexual favors to the then Director in return for job benefits.

Appellant also alleged that she was denied cross-training by the then Director, NFC. Appellant stated that of the 15 to 20 accountants in the Division, only she and another accountant (black male) received any cross- training.

Appellant alleged that the then Director stopped her cross-training because she was female and had filed an EEO complaint.

The then Director stated that he had never denied her cross-training and had never instructed her supervisor to deny her cross-training. The record establishes that there was very little cross-training in the Accounting Division due to the volume of the workload and time restraints.

Appellant alleged that she was discriminated against when she was not selected to attend a course given by the American Government Accountant Association (AGAA). She stated that she was told she could not attend because she was not an AGAA member. The record establishes that four white males also were not selected to attend; one was an AGAA member. The record establishes that a white female who was not an AGAA member did attend the course.

The record establishes that there were three AGAA courses offered at NFC between November 1978 and

November 1980. The Chief, AD, stated that he required supervisors to provide him with a list of employees they recommended to attend a course. The criteria for attendance were: (1) whether the training was needed; and, (2) whether it would help the employee to perform better on the job. The record establishes that at Course #1, one black male and one white male from the Accounting Division attended. At Course #2, one black male and six white males attended. At Course #3, six black females, one black male, two white females and six white males attended. Appellant was not selected to attend any of the courses.

Appellant next alleged that she was harassed on August 7, 1980, when the Chief, CAR, called appellant into his office and stated that the Director, NFC, complained about her talking in the hallway. The record establishes that there was no written policy about talking in the hallway. The Director, NFC, stated that he asked the Chief, CAR, to speak with appellant and employee #1 (white male) about talking in the hall. The record establishes that appellant was told by the Director, NFC, to refrain from talking to other employees in the hallway because it was disrupting employees working in the section. The record establishes that employee #1 was also warned by the Director that he was disturbing other employees when he was talking to a co-worker (not appellant).

*4

(Cite as: 1985 WL 568213, *4 (E.E.O.C.))

The appellant alleged that her performance rating for the period September 27, 1978 to October 30, 1979, was unfairly lowered because of her race and sex and in reprisal. The record establishes that appellant received a rating of '3' (meets position requirements) on a scale of 1-to-5 in all activities rated. The appellant maintained that her Supervisor showed her the rating he had prepared in draft form, in which he evaluated her above average.

She stated that she was told by the Supervisor that he was required to lower the rating. Appellant alleged that the Chief, AD, the Chief, CAR and the Head, General Ledger Section, discriminated against her in causing her Supervisor to lower her appraisal.

The Supervisor (white male) stated that he was told by the Head, General Ledger Section, to lower the rating because the Chief, AD, and the Chief, CAR, would not accept the higher evaluation the Supervisor had given her. The Supervisor stated that he lowered her evaluation because he had been told to do so, but felt she deserved what he had originally given her, a 3.3 overall average. He stated that he refused to sign the evaluation because it was against his advice. He gave the evaluation to the Head, General Ledger Section, and explained that most of the rating period was prior to his term as appellant's supervisor.

He stated that he felt he could properly evaluate appellant, as he had other employees. The rating was then signed by appellant's previous supervisor, the Head, Accounting Section. The Supervisor stated that he had signed ratings in the past for employees he had only supervised for a few months and that this was the first time he had ever been told to lower an evaluation he had prepared. The Head, General Ledger Section, the Chief, AD, and the Chief, CAR, denied telling anyone to lower appellant's performance evaluation.

Appellant stated that her assigned duties were arbitrarily assigned to others. The Chief, AD, the then Director, NFC, and the Chief, CAR, all stated that they had no knowledge of any transfer of appellant's duties. The Head, General Ledger Section, stated that he probably did take the accounts function, queue status report, travel masters reconciliation and agency reporting tasks away from appellant at one time or another. He stated the reason was possibly to train someone else or because appellant was behind in the travel masters reconciliations.

He stated that any reassignments were for better work accomplishment. The Accounting Technician (white female) stated that she was assigned the travel masters reconciliations because appellant was behind in this duty. The Management Analyst stated that she performed the agency reporting duties. She stated that after an office reorganization, the duty was given to appellant and then later returned to her.

Appellant alleged that her name was arbitrarily taken off the overtime list. Appellant's Supervisor stated that the Chief, CAR, told him to deny appellant overtime. The Supervisor stated that when he asked why, the Chief, CAR, referred to appellant in derogatory racial terms. The record establishes that the overtime list is prepared by the Payroll Section personnel. Employees from other sections are permitted to work overtime if they had worked in Payroll before and were familiar with the job. The Supervisor stated that appellant had worked overtime in the section before and was capable of doing the job. He stated that the Chief, CAR, told him to tell appellant that employees from outside the Payroll Section were not desired to work there. The record establishes, and the agency concedes, that appellant's name was crossed off the overtime list on September 10, 1980 for overtime assignments scheduled on September 13, 1980 and that the list was prepared by the Chief, CAR, and approved by the Chief, AD. The record further establishes that other employees who did not work in the Payroll Section were permitted to work overtime in that section.
*5

(Cite as: 1985 WL 568213, *5 (E.E.O.C.))

The record establishes that, on another occasion, appellant was called into work on a weekend to reconcile some computer printouts. She completed the work in 15 minutes and left. Pursuant to agency regulations, appellant received two hours of overtime pay. The Supervisor stated

that the Chief, CAR, told him that if appellant was called in she should work the full two hours to receive the overtime pay. The Supervisor stated that this was not required of other employees. In addition, the Supervisor stated that the Chief, CAR, regularly referred to appellant in derogatory racial terms, such as 'nigger,' and that he did not refer to other blacks or females in this manner.

Appellant alleged that the Head, Accounting Section, wrote the Supervisor about her job performance to harass her. The Head, Accounting Section, stated that he wrote the Supervisor to correct errors that appellant had made. The Supervisor stated that there were, in fact, a few errors and that these were legitimate inquiries.

The record establishes that the Operating Accountant (black male) sent a note to the Supervisor concerning errors made by appellant in her job. The Supervisor stated that the Operating Accountant had been right on one or two points but that some of the errors attributed to appellant were committed by others. The Supervisor stated that he rarely gets such notes and felt that the Operating Accountant was trying to harass appellant. The Supervisor stated that the Operating Accountant told him that he (the Operating Accountant) was instructed to write the notes by the Head, Accounting Section. The Operating Accountant stated that he never provided false information about appellant in the notes and that appellant's error rate was very small. He stated that he has talked to other supervisors about errors committed by employees.

Appellant next alleged that, while training the Management Analyst (MA) and the Systems Accountant (SA), the Head, General Ledger Section, had the MA and the SA attend Cutoff Scheduling Sessions and that she was not permitted to attend. Appellant alleged that these meetings dealt with her work and that the Head, General Ledger Section, discussed work and reporting changes

without informing her of the changes. She stated that she was reprimanded whenever she would not comply with the changes she was never told about.

The Management Analyst (white female) stated that she was told to attend the meetings by the Head, Accounting Section, and that the meetings did not involve any work that appellant did. Both the Management Analyst and the Systems Accountant (white male) denied being trained by appellant and stated that the Cutoff Scheduling Sessions did not require appellant's input.

The agency, in its final decision, found that appellant had not been discriminated against with respect to any of the matters raised in her complaint. Although appellant has appealed the agency's final decision, she has proffered no arguments in support thereof.

ANALYSIS AND FINDINGS

*6

(Cite as: 1985 WL 568213, *6 (E.E.O.C.))

The allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment is a three step procedure: the complainant has the initial burden of proving a prima facie case of discrimination; the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its challenged action; and, the complainant must then prove that the legitimate reasons offered by the employer were not its true reasons, but were a pretext for discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

Generally speaking, in order to establish a prima facie case appellant must show: (1) that she is a member of a group protected by Title VII; and, (2) she was treated differently or less favorably by the agency than similarly situated employees, not in her protected group. Id.

In a reprisal action, it is the burden of the complainant to

establish a prima facie case by showing: (a) that the employee engaged in an activity protected by Title VII; (b) that the employer knew the employee participated in protected activity; and (c) that the employee was treated less favorably following participation in protected activities within such period of time and in such a manner that the fact-finder could infer retaliatory motivation. Brown v. Biglin, 454 F. Supp. 394 (E.D. Pa. 1978); Guilday v. Department of Justice, 485 F. Supp. 324 (D. Del. 1980). See McDonnell Douglas Corp. v. Green, 411 U.S. at 802 n. 13.

Appellant has established that she is a member of two protected groups; she is black and female. The record establishes that appellant filed a complaint of discrimination prior to the occurrence of the matters which are the subject of her second complaint and this appeal. The agency admitted that it was aware of appellant's prior EEO activities. In order to determine if plaintiff has established a prima facie case of race, sex and/or reprisal discrimination, we will examine each allegation separately.

We find that appellant has established a prima facie case of discrimination with regard to her performance appraisal evaluation. The record establishes that the Supervisor determined that appellant had merited an overall average rating of 3.3 on her evaluation. He lowered her rating to a 3.0 because he was told to do so by the Chief, AD, the Chief, CAR, and the Head, General Ledger Section. Although the Supervisor did not supervise appellant for the entire rating period, he evaluated similarly situated employees, not in appellant's protected group, on the same basis and no one instructed him to change or lower their evaluations. The record establishes that, after appellant filed her first complaint of discrimination, the Head, General Ledger Section, the Chief, AD, and the Chief, CAR, all took actions which treated appellant less favorably than similarly situated employees. These three individuals all denied instructing anyone to lower

appellant's evaluation. We find the sworn testimony of the Supervisor to be the most credible because he did evaluate appellant and had no reason to fabricate a story concerning her lowered rating, especially when he considered her to merit a higher rating. Frankly, the denials of the agency officials are not credible. The agency has not articulated a legitimate, nondiscriminatory reason why appellant's performance evaluation rating was lowered. Consequently, we find that the agency's action of lowering her rating was a prohibited discriminatory action. *7

(Cite as: 1985 WL 568213, *7 (E.E.O.C.))

Next, appellant alleged that she was discriminatorily denied a promotion to Supervisory Operating Accountant, GS-510-12, under V.A. Nos. NFC-80-165 thru 169. Four white males, one black male and one white female were selected. We find that it is arguable that appellant has established a prima facie case of race and or sex discrimination since members not of her protected group(s) were selected for the positions. Furthermore, appellant has established a prima facie case of reprisal because her nonselection occurred in such a manner and within such a period of time following her prior complaint that a retaliatory motivation can be inferred.

The agency stated that they selected the best qualified candidates for the positions. An examination of the selectees vis-a-vis appellant demonstrates that they were all equally qualified. We find that the agency has articulated a legitimate, nondiscriminatory reason for its actions. Thus, the burden shifts to appellant to demonstrate that the reasons articulated by the agency were not its true reasons, but rather were a pretext for discrimination.

The record establishes that the Chief, AD (selecting official for V.A. Nos. 165, 166 and 167), stated that the

selection was based on performance evaluations, supervisory comments and his personal knowledge of the applicants' abilities. As discussed above, the appellant's performance evaluation was discriminatorily lowered and the Chief, AD, was partly responsible for this action. Since the selection for these positions was based, in part, on that performance evaluation, we find that the agency's actions in not selecting appellant were based on factors prohibited by Title VII. The record establishes that had appellant received the rating she was entitled to (3.3), absent discrimination, she would have had a better rating than Selectee #4 and may have been better qualified than other selectees. We find, based on the evidence of record, that the reasons articulated by the agency were a pretext for discrimination against appellant. Furthermore, the agency has not shown by clear and convincing evidence that, even absent discrimination, appellant would not have been selected for one of the Supervisory Operating Accountant, GS-570- 12, positions.

Appellant also alleged that she was denied these promotions because she refused the sexual advances of the then Director, NFC. Because we have determined that appellant was discriminated against with respect to the promotion issue on another basis, we need not determine whether she was denied the promotion for reasons concerning her allegations of sexual harassment. Moreover, even if discrimination on this basis was found, the then Director is no longer employed by the agency and any remedial action vis-a-vis that Director would not be possible.

The record establishes that appellant has established a prima facie case with regard to her claim that she was discriminatorily denied overtime. The record establishes that appellant's name was stricken from the overtime list prepared by the Chief, CAR, and approved by the Chief, AD. The reason articulated by the agency for its action was that they did not want employees outside the Payroll

Section working there. However, the record establishes that other employees similarly situated to appellant were permitted to work overtime in the Section. Further, the Supervisor stated that, pursuant to agency policy, appellant was qualified and capable of working this overtime. Moreover, the record establishes that the Chief, CAR, regularly referred to appellant in derogatory racial terms. The agency, in its Final Agency Decision (which adopted its Proposed Disposition), determined there was no discrimination because another black female was given overtime work. While relevant, this fact is not dispositive as to whether appellant was denied overtime because of her race. In addition, the FAD does not address the issue of reprisal. We find, based on the evidence of record as a whole, that the agency has failed to articulate a legitimate, nondiscriminatory reason for denying appellant overtime on September 13, 1980.

*8

(Cite as: 1985 WL 568213, *8 (E.E.O.C.))

The record also establishes that the Chief, CAR, instructed the Supervisor that appellant was not to be given overtime for a full two hours, as was required by agency policy, if she worked less than two hours. No other employee was held to this standard. However, the record establishes that appellant was given full credit, in accordance with agency policy, for the overtime she had worked. While the actions of the Chief, CAR, indicate discriminatory intent, when viewing the record as a whole, there was no injury to appellant concerning this incident.

The appellant alleged that she was harassed when she was reprimanded for talking in the hallway. The record establishes that another employee, not in appellant's protected group, was reprimanded for a similar incident, not involving appellant. We find that appellant has failed to establish a prima facie case on this issue. She has not

shown that the reprimand was based on her race, sex and/or reprisal or that other similarly situated employees not in her protected group were treated more favorably.

The record establishes that appellant applied, but was not selected, for the position of GS-12, Operating Accountant, in the Working Capitol Fund. The personnel records for this vacancy were not contained in the record because, pursuant to agency policy, promotion files were destroyed as they became two years old. The appellant filed her complaint after the records became two years old. However, the evidence of record establishes that, contrary to appellant's assertion, she was on the BQL for the position. The agency maintained that they did not select appellant because she was not the best qualified for the position. The appellant has offered no credible evidence that her nonselection was based on factors prohibited by Title VII. Accordingly, we deny appellant's appeal on this issue.

The record establishes that appellant applied, but was not selected for, the position of Assistant to the Director, GS-301-11 (V.A. No. NFC-77-97). The agency never filled this position. Therefore, we find that appellant has failed to establish a prima facie case of discrimination. There is no evidence in the record to suggest that the agency did not fill the position based on appellant's race, sex and/or reprisal.

Appellant alleged that she was denied cross-training by the then Director. The record establishes that appellant and another accountant (black male) were the only employees to receive any cross-training. The record establishes that there was very little cross-training due to the volume of the workload and time restraints.

Accordingly, we find that appellant has failed to establish that she was treated less favorably than similarly situated employees not in her protected group or that the cross-training was discontinued based upon reprisal.

In fact, appellant received more cross-training than most

accountants in the agency.

Appellant contends that she was not selected to attend AGAA courses offered at NFC because of her race, sex and reprisal. The record establishes that three AGAA courses were held and that appellant did not attend any sessions. Both blacks and females did attend the courses. Appellant has failed to show that her nonselection was based on factors prohibited by Title VII. While the courses did occur after appellant had filed her first EEO complaint, appellant has failed to show that she needed the training or that it would help her perform better in the job, the criteria for attendance. Moreover, the record does not establish a nexus between her nonselection for the course and her participation in protected activity. *9

(Cite as: 1985 WL 568213, *9 (E.E.O.C.))

The record establishes that the Head, Accounting Section, wrote a memo to the Supervisor about deficiencies in appellant's performance. The Supervisor stated that there was merit to the inquiries of the Head, Accounting Section. Appellant was not reprimanded or adversely affected by this action. We find that appellant has failed to establish a prima facie case of discrimination with regard to this incident.

The record further establishes that the Operating Accountant also sent a memo to the Supervisor complaining of deficiencies in appellant's performance. This was an unusual occurrence, according to the Supervisor, and he thought it was intended to harass the appellant. The evidence of record indicates that the Operating Accountant may have been instructed to write the memo by the Head, Accounting Division. The record establishes that there was a factual basis for some of the comments in the memo. The evidence of record, viewed in its entirety, does not support a finding that the actions constituted harassment against appellant. There is no indication that

appellant suffered any harm from these memos, inasmuch as the Supervisor investigated the complaints and corrected the work which was truly deficient, as reported in the memo. No disciplinary action of any kind was taken against appellant and the record shows that the agency benefitted from the correction of the mistakes.

Moreover, there is no evidence that other employees were treated differently than appellant in this regard or that their mistakes were not reported to supervisors.

The record establishes that some of appellant's duties were transferred to other employees after appellant had engaged in protected activity. The agency stated that any transfer of duties was done to benefit the agency and ease the workload. Here, appellant has failed to demonstrate, and the record does not support a finding, that the actions taken by the agency were in reprisal for her participation in protected activity.

Finally, appellant contended that she was not permitted to attend Cutoff Scheduling meetings and that she did not receive information which affected changes in her work. We find that the evidence of record does not establish that appellant was needed at the meetings or that her work was affected by any work changes made at the meetings. Simply, the evidence contained in the record does not support appellant's claim on this issue.

CONCLUSION

Based upon a review of the record, it is the decision of the Equal Employment Opportunity Commission to affirm, in part, and to reverse, in part, the final agency decision and to enter a finding of discrimination with regard to the agency's issuance of appellant's performance appraisal, her nonpromotion to Supervisory Operating Accountant, GS-510-12, and the denial of overtime to appellant. The Commission finds that the agency

unlawfully discriminated against appellant and shall take the actions ordered below.

ORDER

A. The agency is directed to immediately and retroactively promote appellant to the position of Supervisory Operating Accountant, GS-510-12. The effective date of the retroactive promotion is to be determined by the date the other selectees for the position were promoted to the position. The appellant shall be granted backpay and all other benefits which would have accrued in the absence of discrimination. Backpay shall be computed in the same manner as proscribed by 5 C.F.R. 550.804. Reasonable attorney's fees shall be awarded in accordance with
29 C.F.R. 1613.271(c).
*10

(Cite as: 1985 WL 568213, *10 (E.E.O.C.))

B. The agency is directed to reimburse appellant for the overtime pay she would have received on September 13, 1980, but for the agency's discrimination. The agency is directed to examine its records to determine the number of hours of overtime appellant would have worked and pay her that amount in accordance with her salary level. If appellant's retroactive promotion is effective before the date she was discriminatorily denied overtime, her overtime payment is to be based on her retroactive promotion salary.

C. The agency is directed to take appropriate disciplinary action with regard to the Chief, AD, the Chief, CAR, and the Head, General Ledger Section. Such disciplinary action may include removal of rating and/or decision making authority regarding the evaluation of any employee's performance, overtime assignments and the selection process of candidates for promotion. Finally, the

agency is directed to require the Chief, CAR, the Chief, AD, and the Head, General Ledger Section, to attend appropriate training sessions detailing their responsibilities with respect to eliminating discrimination in the federal workplace.

D. The agency is directed to post at its facility at the National Finance Center, New Orleans, Louisiana, copies of the attached notice. Copies of the notice, after being signed by the agency's duly authorized representative, shall be posted by the agency immediately upon receipt, and be maintained by it for 60 calendar days, in conspicuous places, including all places where notices to employees and applicants for employment are customarily posted. The agency shall take reasonable steps to ensure that said notices are not altered, defaced, or covered by any other material.

IMPLEMENTATION OF THE COMMISSION DECISION

Under EEOC Regulations, compliance with the Commission's corrective action is mandatory. The agency must report to the Commission, within thirty (30) calendar days of receipt of the decision, that corrective action has been taken. The agency's report should be forwarded to the Director of Compliance, Office of Review and Appeals, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20507. A copy of the report should be sent to the appellant.

ATTORNEY'S FEES

If appellant has been represented by a member of the Bar, appellant shall be awarded attorney's fees under 29 C.F.R. 1613.271(c). The attorney shall submit to the agency within twenty (20) days of receipt of this decision,

the documentation required by 29 C.F.R. 1613.271(c)(2). The agency shall process the claim within the time frames set forth in 1613.271(c)(2).

NOTICE OF RIGHT TO FILE A CIVIL ACTION

Pursuant to 29 C.F.R. 1613.282, the appellant is hereby notified that this decision is final and that he or she has the right to file a civil action on the Title VII claim in the appropriate United States District Court within thirty (30) days of the date of receipt of this decision.

APPOINTMENT OF COUNSEL

*11

(Cite as: 1985 WL 568213, *11 (E.E.O.C.))

If appellant elects to file a civil action and does not have or is unable to obtain the services of an attorney to act as his or her counsel, appellant may request that the Court appoint an attorney for purposes of the civil action. The Court in its discretion may appoint an attorney to represent appellant and authorize commencement of the action without the payment of fees, costs, or security. A request for the appointment of counsel must be filed with the Court within the time limit for filing a civil action.

NOTICE OF RIGHT TO REQUEST REOPENING

The appellant and the agency are hereby notified that the Commissioners may, in their discretion, reopen and reconsider any previous decision when the party requesting reopening submits written argument or evidence which tends to establish that:

1. New and material evidence is available that was not

readily available when the previous decision was issued;

2. The previous decision involves an erroneous interpretation of law or regulations or misapplication of established policy; or

3. The previous decision is of precedential nature involving a new or unreviewed policy consideration that may have effects beyond the actual case at hand or is otherwise of such an exceptional nature as to merit the personal attention of the Commissioners.

This notice is in accord with 29 C.F.R. 1613.235. As provided therein, agency requests to reopen must be filed within 30 days from the date of receipt of this decision.

FOR THE COMMISSION:

Dolores L. Rozzi
Director
Office of Federal Operations

This Notice is posted pursuant to an Order dated by the United States Equal Employment Opportunity Commission which found that a violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq. had occurred at this facility.

Federal law requires that there be no discrimination against any employee or applicant for employment because of the person's RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, AGE or PHYSICAL or MENTAL HANDICAP with respect to hiring, firing, promotion, compensation, or other terms, conditions or privileges of employment.

The Department of Agriculture supports and will comply with such Federal law and will not take action against individuals because they have exercised their rights under law.

The Department of Agriculture has promoted the individual affected by the Commission's finding. The Department of Agriculture will ensure that officials

responsible for personnel decisions and terms and conditions of employment will abide by the requirements of all federal equal employment opportunity laws and will not discriminate in, among other things, any promotion actions, overtime assignments or with respect to performance appraisals.

The Department of Agriculture will not in any manner restrain, interfere, coerce, or retaliate against any individual who exercises his or her right to oppose practices made unlawful by, or who participates in proceedings pursuant to, Federal equal employment opportunity law.

*12

(Cite as: 1985 WL 568213, *12 (E.E.O.C.))

Date Posted:---
Posting Expires:---
29 C.F.R. Part 1613

FN1 The record establishes that appellant filed a previous complaint of discrimination covering the period June 30, 1974 to December 21, 1975. While the record does not contain a copy of that complaint, it appears to contain promotion and harassment allegations for that period.

FN2 The personnel records for this vacancy were not available. The Personnel Specialist stated, under oath, that merit promotion files are destroyed as they become two years old. To be noted is that appellant filed her complaint after the records for this vacancy became two years old.

FN3 V.A. No. NFC-80-166 created two vacancies.

FN4 The record establishes that the then Director, NFC, is no longer employed by the agency, although he is still employed by the Federal Government at the Department of

Commerce.

1985 WL 568213 (E.E.O.C.)
END OF DOCUMENT

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-30929

VIVIAN PIPER,
Plaintiff-Appellant,

VERSUS

ANN VENEMAN, Secretary, Department of Agriculture,
National Finance Center,
Defendant-Appellee.

Appeal from the United States District Court For the Eastern District of Louisiana (98-CV-3647-L)

Before EMILIO M. GARZA and PARKER, Circuit Judges, and ELLISON, District Judge.*

PER CURIAM:

(√) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (Fed. R. App. P and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT

United States Circuit Judge

*District Judge of the Southern District of Texas, sitting by designation.